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To this end, the Conference conducts research and issues reports concerning various aspects of the administrative process and, when warranted, makes recommendations to the President, Congress, particular departments and agencies, and the judiciary concerning the need for procedural reforms. Implementation of Conference recommendations may be accomplished through direct action on the part of the affected agencies or legislative changes.

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RECOMMENDATION 86-1: NONLAWYER ASSISTANCE AND REPRESENTATION

A substantial number of individuals involved in federal "mass justice"[1] agency proceedings need and desire assistance[2] in filling out forms, filing claims, and appearing in agency proceedings, but are unable to afford assistance or representation by lawyers. A lack of assistance or representation reduces the probability that an individual will obtain favorable results in dealing with an agency. Further, unassisted individuals are more likely than those who are assisted to cause a loss of agency efficiency by requiring more time, effort, and help from the agency.

Federal agencies currently provide help to persons involved in agency proceedings through information given by agency personnel and through funding of legal aid programs and approval or payment of attorney fee awards. This recommendation does not deal with whether government aid may be needed for persons who cannot afford any form of assistance. This recommendation focuses on the potential for increasing the availability of assistance by nonlawyers. Federal agency experience and statistics indicate that qualified persons who are not lawyers generally are capable of providing effective assistance to individuals in mass justice agency proceedings.

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[1] The term "mass justice" is used here to categorize an agency program in which a large number of claims or disputes involving individual or family matters come before an agency; e.g., the Old Age Survivors and Disability Insurance program administered by the Social Security Administration. To the extent that principles incorporated in this recommendation may be applicable to other programs in which non-lawyer assistance or representation is (or could be made) available, the Conference recommends the consideration of these principles by the agencies involved.

[2] The term "assistance" is used here to indicate all forms of help, including representation, that may be beneficial to a person in dealing with an agency. The term "representation" is used whenever the most likely form of assistance involves such activities as making an appearance, signing papers, or speaking for the assisted individual. Neither term is meant to be exclusive.

While it is recognized that no established privilege protects the confidentiality of communications between nonlawyers and their clients, agencies may adopt some protections covering their own proceedings. The possible limitation of such protections does not outweigh the benefits of increased assistance and representation.

Agency practices do not currently maximize the potential for free choice of assistance, and, in some instances, may hinder the availability of qualified, low-cost assistance by nonlawyers. Agencies should take the steps necessary to encourage—as well as eliminate inappropriate barriers to—nonlawyer assistance and representation.

Agencies generally have the authority to authorize any person to act as a representative for another person having business with the agency. Where an agency intends to permit nonlawyers to assist individuals in agency matters, the agency needs to state that intention affirmatively in its regulations for two reasons. First, an affirmative statement is essential, under existing case law, to protect a nonlawyer from prosecution–under state "unauthorized practice of law" prohibitions—for assisting and advising a federal client preparatory to commencing agency proceedings, as well as for advertising the availability of services. Second, an affirmative agency position is needed to overcome a common assumption of nonlawyers that agencies welcome only lawyers as representatives, and thereby to encourage an increase in the provision of nonlawyer services.

RECOMMENDATION

1. The Social Security Administration, the Immigration and Naturalization Service, the Veterans Administration, the Internal Revenue Service, and other federal agencies that deal with a significant number of unassisted persons who have individual or

family claims or disputes before the agency, should review their regulations regarding assistance and representation. The review should be directed toward the goals of authorizing increased assistance by nonlawyers, and of maximizing the potential for free choice of representative to the fullest extent allowed by law.

2. If an agency determines that some subject areas or types of its proceedings are so complex or specialized that only specially qualified persons can adequately provide representation, then the agency may need to adopt appropriate measures to ensure that nonlawyers meet specific eligibility criteria at some or all stages of representation. Agencies should tailor any eligibility requirements so as not to exclude nonlawyers (including nonlawyers who charge fees) as a class, if there are nonlawyers who, by reason of their knowledge, experience, training, or other qualification, can adequately provide assistance or representation.

3. Agencies should declare unambiguously their intention to authorize assistance and representation by nonlawyers meeting agency criteria. Where a declaration by an agency may have the effect of preempting state law (such as "unauthorized practice of law" prohibitions), then the agency should employ the procedures set out in Recommendation 84-5 with regard to notification of and cooperation with the states and other affected groups.

4. Agencies should review their rules of practice that deal with attorney conduct (such as negligence, fee gouging, fraud, misrepresentation, and representation when there is a conflict of interest) to ensure that similar rules are made applicable to nonlawyers as appropriate, and should establish effective agency procedures for enforcing those rules of practice and for receiving complaints from the affected public.

RECOMMENDATION 86-2:

USE OF FEDERAL RULES OF EVIDENCE IN FEDERAL AGENCY ADJUDICATIONS

Federal agencies have adopted hundreds of different sets of rules governing admission of evidence in formal adjudications. While those rules vary in their details, they can be placed in three general categories: (1) Rules that reflect the wide open standard of APA section 556(d); (2) rules that require presiding officers to apply the Federal Rules of Evidence (FRE) "so far as practicable;" and, (3) rules that permit presiding officers to use the FRE as a source of guidance in making evidentiary rulings. In a few instances, Congress has required the agency to adopt a standard that refers to the FRE; in other cases the agency voluntarily adopted such a standard.

Presiding officers vary substantially in the extent of their use of the FRE as a source of guidance in making evidentiary rulings. Presiding officers at agencies whose rules refer to the FRE rely on the FRE as a source of guidance much more frequently than presiding officers at agencies whose rules reflect only the APA standard. Presiding officers at agencies with rules that refer to the FRE are more satisfied with the rule they apply than presiding officers at agencies with rules that reflect only the APA standard. The relative dissatisfaction expressed by many presiding officers in the latter group seems to be based on their perception that the APA standard does not accord them sufficient discretion to engage in responsible case management. Because they perceive that they do not have the discretion to exclude evidence they consider clearly unreliable, they must devote valuable hearing and opinion-writing time to reception and consideration of such evidence.

Because the APA evidentiary standard is broadly permissive, courts routinely decline to reverse agencies that have adopted this standard on the basis of alleged erroneous admission of evidence. However, courts seem confused by the FRE "so far as practicable" evidence standard. Some courts apparently interpret it to accord near total discretion to agencies. Other courts interpret it as a mandate to comply with the FRE except in unusual circumstances. Still others apparently view the standard as a mandate to admit evidence inadmissible under the FRE except when unusual circumstances require application of the FRE.

Independent of the evidentiary standard adopted by the agency, reviewing courts apply three general rules: (1) an agency must respect evidentiary privileges; (2) an agency can be reversed if it declines to admit evidence admissible under the FRE; and (3) an agency will be reversed if it bases a finding on unreliable evidence.

The FRE "so far as practicable" standard has four significant disadvantages: (1) courts seem confused as to what it means or how to enforce it; (2) instructing presiding officers to exclude evidence based on the standard forces them to undertake a difficult and hazardous task; (3) excluding evidence on the basis that it is inadmissible in a jury trial is totally unnecessary to insure that agencies act only on the basis of reliable evidence; and (4) agencies, like other experts, should be permitted to rely on classes of evidence broader than those that can be considered by lay jurors. Yet the APA standard alone has the disadvantage that presiding officers perceive it as an inadequate tool for effective case management, despite the fact that it permits presiding officers to use relevant parts of the FRE and scholarly texts as sources of general guidance in making evidentiary rulings in formal adversarial adjudications. Federal Rule 403 can be particularly valuable to presiding officers in discharging their case management responsibilities. That rule authorizes exclusion of evidence the probative value of which is substantially outweighed by other factors, including the consideration of undue delay. In addition, under any set of evidentiary rules, an agency can assist presiding officers in their evidentiary decisionmaking by specifying, insofar as they can be foreseen, the factual issues the agency considers material to the resolution of various classes of adjudications and the types of evidence it considers reliable and probative with respect to recurring factual issues.

RECOMMENDATION

1. Congress should not require agencies to apply the Federal Rules of Evidence, with or without the qualification "so far as practicable," to limit the discretion of presiding officers to admit evidence in formal adjudications.[1]

2. Agencies should adopt evidentiary regulations applicable to formal adversarial adjudications that clearly confer on presiding officers discretion to exclude unreliable evidence and to use the weighted balancing test in Rule 403 of the Federal Rules of Evidence, which allows exclusion of evidence the probative value of which is substantially outweighed by other factors, including its potential for undue consumption of time.

3. To facilitate the efficient and fair management of the proceeding, when otherwise appropriate, an agency should announce in advance of a formal adjudication as many of the factual issues as the agency can foresee to be material to the resolution of the adjudication.

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[1] The term "formal adjudications" refers to adjudications required by statute to be determined on the record after opportunity for an agency hearing in accordance with the Administrative Procedure Act, 5 U.S.C. 554, 556 and 557, and also includes agency adjudications which by regulation or by agency practice are conducted in conformance with these provisions. The recommendation does not apply to nonadversarial hearings, *e.g.*, many Social Security disability proceedings.

RECOMMENDATION 86-3: AGENCIES' USE OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION

Federal agencies now decide hundreds of thousands of cases annually—far more than do federal courts. The formality, costs and delays incurred in administrative proceedings have steadily increased, and in some cases now approach those of courts. Many agencies act pursuant to procedures that waste litigants' time and society's resources and whose formality can reduce the chances for consensual resolution. The recent trend toward elaborate procedures has in many cases imposed safeguards whose transaction costs, to agencies and the public in general, can substantially outweigh their benefits.

A comprehensive solution to reducing these burdens is to identify instances where simplification is appropriate. This will require a careful review of individual agency programs and the disputes they involve. A more immediate step is for agencies to adopt alternative means of dispute resolution, typically referred to as "ADR," or to encourage regulated parties to develop their own mechanisms to resolve disputes that would otherwise be handled by agencies themselves. ADR methods have been employed with success in the private sector for many years, and when used in appropriate circumstances, have yielded decisions that are faster, cheaper, more accurate or otherwise more acceptable, and less contentious. These processes include voluntary arbitration, mandatory arbitration, factfinding, minitrials, mediation, facilitating, convening and negotiation. (A brief lexicon defining these terms is included in the Appendix to this recommendation.) The same forces that make ADR methods attractive to private disputants can render them useful in cases which a federal agency

decides, or to which the government is a party. For these methods to be effective, however, some aspects of current administrative procedure may require modification.
It is premature to prescribe detailed procedures for a myriad of government activities since the best procedure for a program, or even an individual dispute, must grow out of its own needs. These recommendations therefore seek to promote increased, and thoughtful, use of ADR methods. They are but a first step, and ideally should be supplemented with further empirical research, consultation with experts and interested parties, and more specific Conference proposals.

RECOMMENDATION

A. General

1. Administrative agencies, where not inconsistent with statutory authority, should adopt the alternative methods discussed in this recommendation for resolving a broad range of issues. These include many matters that arise as a part of formal or informal adjudication, in rulemaking,[1] in issuing or revoking permits, and in settling disputes, including litigation brought by or against the government. Until more experience has been developed with respect to their use in the administrative process, the procedures should generally be offered as a voluntary, alternative means to resolve the controversy.

2. Congress and the courts should not inhibit agency uses of the ADR techniques mentioned herein by requiring formality where it is inappropriate.

B. Voluntary Arbitration

3. Congress should act to permit executive branch officials to agree to binding arbitration to resolve controversies. This legislation should authorize any executive official who has authority to settle controversies on behalf of the government to

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[1] See ACUS Recommendations 82-4 and 85-5, "Procedures for Negotiating Proposed Regulations," 1 CFR §§305.82-4 and 85-5.

agree to arbitration, either prior to the time a dispute may arise or after a controversy has matured, subject to whatever may be the statutory authority of the Comptroller General to determine whether payment of public funds is warranted by applicable law and available appropriations.

4. Congress should authorize agencies to adopt arbitration procedures to resolve matters that would otherwise be decided by the agency pursuant to the Administrative Procedure Act ("APA") or other formal procedures. These procedures should provide that—

(a) All parties to the dispute must knowingly consent to use the arbitration procedures, either before or after a dispute has arisen.

(b) The parties have some role in the selection of arbitrators, whether by actual selection, by ranking those on a list of qualified arbitrators, or by striking individuals from such a list.

(c) Arbitrators need not be permanent government employees, but may be individuals retained by the parties or the government for the purpose of arbitrating the matter.

(d) Agency review of the arbitral award be pursuant to the standards for vacating awards under the U.S. Arbitration Act, 9 U.S.C. § 10, unless the award does not become an agency order or the agency does not have any right of review.

(e) The award include a brief, informal discussion of its factual and legal basis, but neither formal findings of fact nor conclusions of law.

(f) Any judicial review be pursuant to the limited scope-of-review provisions of the U.S. Arbitration Act, rather than the broader standards of the APA.

(g) The arbitral award be enforced pursuant to the U.S. Arbitration Act, but is without precedential effect for any purpose.

5. Factors bearing on agency use of arbitration are:

(a) Arbitration is likely to be appropriate where—

(1) The benefits that are likely to be gained from such a proceeding outweigh the probable delay or costs required by a full trial-type hearing.

(2) The norms which will be used to resolve the issues raised have already been established by statute, precedent or rule, or the parties explicitly desire the arbitrator to make a decision based on some general standard, such as "justice under the circumstances," without regard to a prevailing norm.

(3) Having a decisionmaker with technical expertise would facilitate the resolution of the matter.

(4) The parties desire privacy, and agency records subject to disclosure under the Freedom of Information Act are not involved.

(b) Arbitration is likely to be inappropriate where—

(1) A definitive or authoritative resolution of the matter is required or desired for its precedential value.

(2) Maintaining established norms or policies is of special importance.

(3) The case significantly affects persons who are not parties to the proceeding.

(4) A full public record of the proceeding is important.

(5) The case involves significant decisions as to government policy.

6. Agency officials, and particularly regional or other officials directly responsible for implementing an arbitration or other ADR procedure, should make persistent efforts to increase potential parties' awareness and understanding of these procedures.

C. Mandatory Arbitration

7. Arbitration is not in all instances an adequate substitute for a trial-type hearing pursuant to the APA or for civil litigation. Hence, Congress should consider mandatory arbitration only where the advantages of such a proceeding are clearly outweighed by the need to (a) save the time or transaction costs involved or (b) have a technical expert resolve the issues.

8. Mandatory arbitration is likely to be appropriate only where the matters to be resolved—

(a) Are not intended to have precedential effect other than the resolution of the specific dispute, except that the awards may be published or indexed as informal guidance;

(b) May be resolved through reference to an ascertainable norm such as statute, rule or custom;[2]

(c) Involve disputes between private parties; and

(d) Do not involve the establishment or implementation of major new policies or precedents.

9. Where Congress mandates arbitration as the exclusive means to resolve a dispute, it should provide the same procedures as in Paragraph 4, above.

D. Settlement Techniques

10. In many situations, agencies already have the authority to use techniques to achieve dispute settlements. Agencies should use this authority by routinely taking advantage of opportunities to:

(a) Explicitly provide for the use of mediation.

(b) Provide for the use of a settlement judge or other neutral agency official to aid the parties in reaching agreement.[3] These persons might, for instance, advise the parties as to the likely outcome should they fail to reach settlement.

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[2] For example, the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §136 *et seq.*, provides for mandatory arbitration with respect to the amount of compensation one company must pay another and yet provides no guidance with respect to the criteria to be used to make these decisions. The program has engendered considerable controversy and litigation.

[3] *See, e.g.*, the procedure used by the Federal Energy Regulatory Commission.

(c) Implement agreements among the parties in interest, provided that some means have been employed to identify other interested persons and afford them an opportunity to participate.

(d) Provide for the use of minitrials.

(e) Develop criteria that will help guide the negotiation of settlements.[4]

11. Agencies should apply the criteria developed in ACUS Recommendations 82-4 and 85-5, pertaining to negotiated rulemaking,[5] in deciding when it may be appropriate to negotiate, mediate or use similar ADR techniques to resolve any contested issue involving an agency. Settlement procedures may not be appropriate for decisions on some matters involving major public policy issues or having an impact on persons who are not parties, unless notice and comment procedures are used.

12. Factors bearing on agency use of minitrials as a settlement technique are:

(a) Minitrials are likely to be appropriate where—

(1) The dispute is at a stage where substantial additional litigation costs, such as for discovery, are anticipated.

(2) The matter is worth an amount sufficient to justify the senior executive time required to complete the process.

(3) The issues involved include highly technical mixed questions of law and fact.

(4) The matter involves materials that the government or other parties believe should not be revealed.

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[4] *See* ACUS Recommendation 79-3, "Agency Assessment and Mitigation of Civil Money Penalties," 1 CFR §305.79-3.

[5] *See also*, ACUS Recommendation 84-4, "Negotiated Cleanup of Hazardous Waste Sites Under CERCLA," 1 CFR §305.84-4.

(b) Minitrials are likely to be inappropriate where—

(1) Witness credibility is of critical importance.

(2) The issues may be resolved largely through reference to an ascertainable norm.

(3) Major questions of public policy are involved.

13. Proposed agency settlements are frequently subjected to multiple layers of intra-agency or other review and therefore may subsequently be revised. This uncertainty may discourage other parties from negotiating with federal officials. To encourage settlement negotiations, agencies should provide means by which all appropriate agency decisionmakers are involved in, or regularly apprised of, the course of major negotiations; agencies should also endeavor to streamline intra-agency review of settlements. These efforts should serve to ensure that the concerns of interested segments of the agency are reflected as early as possible in settlement negotiations, and to reduce the likelihood that tentative settlements will be upset.

14. In cases where agencies must balance competing public policy interests, they should adopt techniques to enable officials to assess, in as objective a fashion as possible, the merits of a proposed settlement. These efforts might include establishing a small review panel of senior officials or neutral advisors, using a minitrial, publishing the proposed settlement in the Federal Register for comment, securing tentative approval of the settlement by the agency head or other senior official, or employing other means to ensure the integrity of the decision.

15. Some agency lawyers, administrative law judges, and other agency decisionmakers should be trained in arbitration, negotiation, mediation, and similar ADR skills, so they can (a) be alert to take advantage of alternatives or (b) hear and resolve other disputes involving their own or another agency.

E. Private Sector Dispute Mechanisms

16. Agencies should review the areas that they regulate to determine the potential for the establishment and use of dispute resolution mechanisms by private organizations as an alternative to direct agency action. Where such use is appropriate, the agency should—

(a) Specify minimal procedures that will be acceptable to qualify as an approved dispute resolution mechanism.

(b) Oversee the general operation of the process; ordinarily, it should not review individual decisions.

(c) Tailor its requirements to provide an organization with incentives to establish such a program, such as forestalling other regulatory action, while ensuring that other interested parties view the forum as fair and effective.

Appendix

Lexicon of Alternative Means of Dispute Resolution

Arbitration. Arbitration is closely akin to adjudication in that a neutral third party decides the submitted issue after reviewing evidence and hearing argument from the parties. It may be binding on the parties, either through agreement or operation of law, or it may be non-binding in that the decision is only advisory. Arbitration may be voluntary, where the parties agree to resolve the issues by means of arbitration, or it may be mandatory, where the process is the exclusive means provided.

Factfinding. A "factfinding" proceeding entails the appointment of a person or group with technical expertise in the subject matter to evaluate the matter presented and file a report establishing the "facts." The factfinder is not authorized to resolve policy issues. Following the findings, the parties may then negotiate a settlement, hold further proceedings, or conduct more research.

Minitrial. A minitrial is a structured settlement process in which each side presents a highly abbreviated summary of its case before senior officials of each party authorized to settle the case. A neutral adviser sometimes presides over the proceeding and will render an advisory opinion if asked to do so. Following the presentations, the officials seek to negotiate a settlement.

Mediation. Mediation involves a neutral third party to assist the parties in negotiating an agreement. The mediator has no independent authority and does not render a decision; any decision must be reached by the parties themselves.

Facilitating. Facilitating helps parties reach a decision or a satisfactory resolution of the matter to be addressed. While often used interchangeably with "mediator," a facilitator generally conducts meetings and coordinates discussions, but does not become as involved in the substantive issues as does a mediator.

Convening. Convening is a technique that helps identify issues in controversy and affected interests. The convenor is generally called upon to determine whether direct negotiations among the parties would be a suitable means of resolving the issues, and if so, to bring the parties together for that purpose. Convening has proved valuable in negotiated rulemaking.

Negotiation. Negotiation is simply communication among people or parties in an effort to reach an agreement. It is used so routinely that it is frequently overlooked as a specific means of resolving disputes. In the administrative context, it means procedures and processes for settling matters that would otherwise be resolved by more formal means.

RECOMMENDATION 86-4:
THE SPLIT-ENFORCEMENT MODEL FOR AGENCY ADJUDICATION

Separation of functions in administrative adjudication has usually been achieved through internal barriers within the agency which separate and insulate those employees who judge from those who investigate and prosecute. The chains of command, however, come together at the top in the person of the head or heads of the agency, who, through subordinates, are responsible for all three functions. Internal separation of functions is sanctioned and contemplated by the Administrative Procedure Act. When combined with the protections accorded to administrative law judges who preside over adjudicatory hearings, it appears, on the whole, to have worked satisfactorily in providing fair and impartial factfinding, while permitting the agency to speak with a single voice on matters of law and policy. Yet the experience with internal separation of functions has never entirely silenced the critics who argue that it is impossible to achieve evenhanded justice when enforcement and adjudicative functions are lodged in the same agency.

Congress has, therefore, on a number of occasions sought to carry separation of functions a step further. In the Occupational Safety and Health Act of 1970, an agency in the Department of Labor, the Occupational Safety and Health Administration (OSHA), was assigned the responsibility for promulgating industrial health and safety standards and for enforcing these standards through inspections and the filing of complaints against employers. The responsibility for adjudicating such complaints, however, was assigned to a wholly independent three-member agency, the Occupational Safety and Health Review Commission

(OSHRC), which employs administrative law judges to hear enforcement cases brought by OSHA and to issue initial decisions subject to commission review. A similar division of responsibilities was created in the area of mine safety and health in the Federal Mine Safety and Health Amendments Act of 1977. This statute assigned rulemaking and enforcement to the Mine Safety and Health Administration in the Department of Labor and adjudication to the independent Federal Mine Safety and Health Review Commission (FMSHRC).[1]

An Administrative Conference study of the experience with the "split-enforcement model" used in the occupational safety and mine safety legislation was unable to conclude whether this model achieves greater fairness in adjudication than does the traditional structural model. Fairness is an important but an unquantifiable and subjective value. Therefore, the Conference takes no position on whether the split-enforcement model is preferable to a structure in which responsibilities for rulemaking, enforcement and adjudication are combined within a single agency. Our study did reveal, however, that because Congress, in enacting the Occupational Safety and Health Act, did not specify clearly the respective responsibilities of OSHA and OSHRC in resolving questions of law and policy, unnecessary conflicts have arisen between the agencies and there has been confusion expressed by reviewing courts over which agency's views were entitled to the greater deference. For a variety of reasons these conflicts and confusion have been largely avoided in the later enacted mine safety legislation.

RECOMMENDATION

1. Where Congress establishes an enforcement scheme in which rulemaking and prosecution are assigned to one agency and adjudication to another agency, it should make clear in which agency it intends to place programmatic responsibility and direct the courts to look to that agency for authoritative expressions of law or policy. Congress should also attempt to foresee other areas

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[1] The system for enforcing certain provisions of the Federal Aviation Act also conforms generally to this model but was not part of the study. *See* 49, App. U.S.C. §1903 (a)(9).

of potential conflict, such as control over litigation and settlements, and should so far as possible specify the respective responsibilities of each agency and the procedures for resolving disagreements.

2. Generally speaking, Congress should provide that in adjudicatory challenges to standards promulgated pursuant to agency statutory authority, the adjudicatory agency must accept the rulemaking agency's interpretation of the standard unless it can be shown that the rulemaking agency's interpretation is arbitrary, capricious, or otherwise not in accordance with law. So far as is practical, the rulemaking agency should provide notice to the affected public concerning the administrative interpretation of its rules and regulations, the policies that they represent, and their intended implementation in enforcement.

3. Where uncertainties exist with regard to the responsibilities of agencies already implementing split-enforcement schemes, Congress should act to resolve those uncertainties consistent with the foregoing, if the agencies are unable to do so.

RECOMMENDATION 86-5: MEDICARE APPEALS

The Medicare program, since 1965, provides health insurance for nearly all elderly and most disabled Americans. The program relies on hospitals, nursing homes and other health care institutions (under "Part A" of the program) and physicians and suppliers (under "Part B") to provide benefits to its beneficiaries.

This program, serving 30 million persons, has been administered since 1977 by the Health Care Financing Administration (HCFA), within the Department of Health and Human Services (HHS). Congress purposefully created a decentralized system, with implementation by localized carriers and intermediaries, primarily insurance companies. HCFA contracts with these organizations to administer the millions of claims made by beneficiaries each year and the resulting payments to providers. For Part A these organizations are known as "fiscal intermediaries" and for Part B they are referred to as "carriers." Additionally, statutorily - mandated peer review organizations (PROs), made up of physician-controlled organizations under contract with HCFA, have been given new responsibility to decide many disputes raised by beneficiaries and hospitals under Part A. To guide its contractors, HCFA issues health insurance manuals containing detailed instructions, though they normally are not published through notice-and-comment rulemaking.

HCFA also issues "national coverage decisions" on whether new medical technologies and procedures are covered by Medicare. These decisions are sometimes made after a recommendation is sought from the HHS Office of Health Technology Assessment (OHTA). Only when OHTA advice is sought does HCFA publish notice in the Federal Register. In most cases, affected manufacturers, providers and beneficiaries have no notice or opportunity to file comments on proposed action, and neither HCFA nor OHTA has published its decisionmaking procedures or its criteria for making these decisions.

Rapidly rising program expenditures, especially inflation in hospital care costs, led Congress to take a number of steps to control costs. In 1982, the PRO system was created and was delegated important responsibility to deny Medicare payment for inappropriate or unnecessary services and to sanction providers for improper practices. In the following two years Congress froze physician charges for fifteen months and completely revamped the reimbursement system for hospitals by creating the "prospective payment system" under which Medicare pays hospitals a predetermined fixed price for each patient case (according to a classification system of some 470 Diagnosis Related Groupings or DRGs), regardless of the actual costs incurred in treating that patient. The prices are subject to annual updating and the classification system is to be reviewed annually. Congress created the advisory Prospective Payment Assessment Commission to participate in this process. Additionally, to mitigate fears that the prospective payment system might lead to unnecessary brief admissions or premature release of patients, Congress charged the PROs with the responsibility for monitoring hospital admissions and discharge practices. In the first years of this program, hospital admissions for the elderly declined for the first time since 1965, the average length of stay also declined and there was a greater utilization of outpatient services. Moreover, many hospitals have made record profits under the new system while reducing the rate of inflation in hospital costs. There has also been a marked increase in physician (Part B) services, as patients have moved out of hospitals and into outpatient care, and to greater reliance on home health services.

The Medicare appeals system is a patchwork with differing administrative and judicial review requirements for beneficiaries and providers and differing rules for Part A and Part B appeals.

Under Part A, most cases are beneficiary appeals primarily involving coverage determinations. Initial determinations are by PROs if hospital services are involved and by fiscal intermediaries for other Part A services. A reconsideration step is built in. After this "paper review," administrative review is then available by an administrative law judge in the Social Security Office of Hearings and Appeals if the amount in controversy exceeds $100

($200 in hospital cases). The SSA Appeals Council may review and reverse the ALJ's decision on its own motion. Judicial review in the district court is available for the beneficiary if the amount in controversy is $1000 ($2000 in hospital cases).

Providers who have disputes concerning reimbursement under Part A (over $10,000) may bring appeals to the Provider Reimbursement Review Board (PRRB), a five-member board within HHS. (Appeals involving amounts between $1,000 and $10,000 are heard by fiscal intermediaries.) The Secretary may review PRRB decisions on his own motion and providers have a right to judicial review. The PRRB's effectiveness as an independent adjudicator of provider payment disputes has been called into question by provider groups who have raised concerns about its independence, jurisdiction, slowness and its procedures for handling group appeals. Moreover, the PRRB's role under the prospective payment system has been changing. The Board does retain jurisdiction over appeals remaining under the old system and over some key issues concerning allowable costs, and availability of payments under the new system. But, HCFA rulings and regulations have constrained the PRRB's jurisdiction in prospective payment rate cases and provided that it may not order retrospective correction of errors in those rates. Moreover, some key provider appeals such as those involving errors in DRG assignment have been transferred to PROs. No further review is available in such cases.

Until passage of the Omnibus Budget Reconciliation Act of 1986, P.L. 99-509, there was no administrative and judicial review of Part B claims. However, under the new law, beneficiaries with disputed claims of over $500 (and physicians who have accepted assignment of such claims) have a right to a hearing before an administrative law judge, and to subsequent judicial review if the claim exceeds $1,000. Previously there was no judicial review and beneficiaries with Part B claims exceeding $100 were limited to a "fair hearing" before an officer selected by the carrier. (This procedure will continue for claims between $100 and $500 under the new legislation.)

The new legislation also made several other important changes in the laws affecting Medicare. The legislation:

-- authorizes persons affiliated with providers to represent beneficiaries in Part A appeals as long as no financial liability is imposed in connection with the representation;

-- requires that HCFA regulations regarding the Medicare program provide for a 60-day comment period;

-- requires expanded notice procedures for medicare patients concerning their hospital discharge rights;

-- mandates various new requirements on PROs to review beneficiary complaints and to review the quality of care provided; and

-- expands appeal rights in home health care cases involving so-called "technical denials" of benefits.

The Conference welcomes these changes. Indeed, at the time of their enactment, the Conference was actively considering recommendations concerning some of them. Other aspects of the process, however, also deserve modification or, at least, further study. We therefore call upon HCFA to continue its efforts to improve the implementation of this important program by heeding the following specific suggestions.

RECOMMENDATION

I. Publication of Policies

A. The Health Care Financing Administration (HCFA) should keep up to date and provide reasonable access to all standards, guidelines and procedures used in making coverage and payment determinations under Part A and Part B of the Medicare program.

B. In promulgating interpretations of Medicare benefits likely to have substantial impact on the public, HCFA should adopt procedures that allow for public comment (either pre-promulgation or post-adoption). See ACUS Recommendation 76-5.

C. HCFA by regulation (or Congress by legislation if necessary) should require fiscal intermediaries and carriers to publish and provide reasonable access to all insurance industry rules or other screening devices used in making coverage and payment determinations under Part A and Part B.

D. HHS should introduce more openness and regularity into the procedure for issuing "national coverage decisions" pertaining to new medical technologies and procedures, through:

(1) development of published decisional criteria; (2) providing for notice and inviting comments in such cases, both in HCFA's decisionmaking process and in the process by which the HHS Office of Health Technology Assessment supplies recommendations to HCFA; and (3) providing for internal administrative review or reconsideration of such decisions.

II. Administrative Appeal Procedures

A. HCFA should continue to develop and assess the adequacy and timing of notice to beneficiaries about coverage and payment decisions on medical benefits and appeal rights regarding these decisions.

B. Because of the increased caseload in Medicare appeals adjudication anticipated after the recent enactment of new appeal rights in Part B cases, HHS should consider whether modification of the existing adjudicatory system is necessary, including whether to establish a Medicare appeals division with its own administrative law judges and review procedure.

C. When resolving hospital rate appeals under the prospective payment system, the Provider Reimbursement Review Board should be authorized, by regulation (or, if necessary, by legislation) to assume jurisdiction of an individual hospital's appeal in a manner that affords timely relief to successful appellants.

III. Suggestions for Further Study

HCFA should undertake or support additional research in the following areas:

A. An empirical study of the role, performance and procedures of:

(1) Fiscal intermediaries and carriers in making coverage and payment determination under Part A and Part B;

(2) Peer review organizations in adjudicating Part A appeals by beneficiaries and by hospitals under the prospective payment system.

B. A comprehensive analysis of the current administrative arrangement by which hospital payment rates are updated under the prospective payment system (taking into account the need for fair ratemaking, timely resolution of disputes and budgetary controls), including an assessment of the Prospective Payment Assessment Commission in this process.

C. An examination of the future role and responsibilities of the Provider Reimbursement Review Board under the prospective payment system, including its jurisdiction, need for expedited review procedures for group appeals, qualifications for membership, adequacy of budget and administrative support, and the need for independence from the rest of the Department.

D. An examination of whether or not the implementation of the statutorily-mandated peer review program should be done to a greater extent through notice-and-comment rulemaking, rather than through reliance upon program instructions and contract provisions.

E. A study of HCFA's use of statistical sampling techniques to determine project overpayments to a provider for a given year, and whether the use of these techniques may effectively deny beneficiaries or providers the opportunity to challenge payment determinations based on actual claims experience.

F. A study of whether, in hospital rate appeals, HCFA should allow retroactive correction of erroneous calculations of a hospital's payment rate for affected prior years under the prospective payment system, and payment to hospitals accordingly.

G. A study of the process by which ALJ reversals of claim denials are implemented by intermediaries and providers, including the need for tighter accounting of payments to beneficiaries and reimbursements to providers.

H. An examination of the feasibility and utility of setting internal time guidelines for each stage of the Medicare appeals process, including reconsiderations; ALJ hearings and Appeals Council review.

RECOMMENDATION 86-6:
PETITIONS FOR RULEMAKING

The Administrative Procedure Act (APA) requires each federal agency to give interested persons the right to petition for the issuance, amendment, or repeal of a rule, 5 U.S.C. §553(e). The APA also requires that agencies conclude matters presented to them within a reasonable time, 5 U.S.C. §555(b), and give prompt notice of the denial of actions requested by interested persons, 5 U.S.C. §555(e). The APA does not specify the procedures agencies must follow in receiving, considering, or disposing of public petitions for rulemaking.[1] However, agencies are expected to establish and publish such procedures in accordance with the public information section of the APA. *See* ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 38 (1947). An Administrative Conference study of agency rulemaking petition procedures and practices found that while most agencies with rulemaking power have established some procedures governing petitions for rulemaking, few agencies have established sound practices in dealing with petitions or responded promptly to such petitions.

This Recommendation sets forth the basic procedures that the Conference believes should be incorporated into agency procedural rules governing petitions for rulemaking. In addition, the Conference encourages agencies to adopt certain other procedures and policies where appropriate and feasible. The Conference feels that, beyond this basic level, uniform specification of agency petition procedures would be undesirable because there are significant differences in the number and nature of petitions received by agencies and in the degree of sophistication of each agency's community of interested persons.

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[1] But other statutes expressly create the right to petition for rulemaking, and some of these statutes specify procedures to be followed in the petitioning process.

Agencies should review their rulemaking petition procedures and practices and, in accordance with this Recommendation, adopt measures that will ensure that the right to petition is a meaningful one. The existence of the right to petition reflects the value Congress has placed on public participation in the agency rulemaking process. The Administrative Conference has recognized, in past recommendations, the benefits flowing from public participation in agency rulemaking and from publication of the means for such participation.[2] The absence of published petition procedures, excessive or rigidly-enforced format requirements, and the failure to act promptly on petitions for rulemaking may undermine the public's right to file petitions for rulemaking.

Some agencies currently have petition-for-rulemaking procedures that are more elaborate than those recommended in this Recommendation. This Recommendation is not intended to express a judgment that such procedures are inappropriate or that the statutes mandating particular procedures should be amended. Nor is the Recommendation intended to alter the prior position of the Conference recommending elimination of the categorical exemptions of certain types of rulemaking from the APA's rulemaking requirements. *See* Recommendations 69-8 and 73-5. To the extent Congress or agencies adopt those recommendations, they should also expressly apply the right to petition to those types of rulemaking.

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[2] *See* RECOMMENDATION 69-8, *Elimination of Certain Exemptions from the APA Rulemaking Requirements*, 1 C.F.R. §305.69-8; RECOMMENDATION 71-6, *Public Participation in Administrative Hearings*, 1 C.F.R. §305.71-6; RECOMMENDATION 73-5, *Elimination of the "Military or Foreign Affairs Function" Exemption from APA Rulemaking Requirements*, 1 C.F.R. §305.73-5; RECOMMENDATION 76-5, *Interpretive Rules of General Applicability and Statements of General Policy*, 1 C.F.R. §305.76-5; and RECOMMENDATION 83-2, *The "Good Cause" Exemption from APA Rulemaking Requirements*, 1 C.F.R. §305.83-2.

RECOMMENDATION

1. Agencies should establish by rule basic procedures for the receipt, consideration, and prompt disposition of petitions for rulemaking. These basic procedures should include: (a) specification of the address(es) for the filing of petitions and an outline of the recommended contents of the petition, such as the name, address, and telephone number of the petitioner, the statutory authority for the action requested, and a description of the rule to be issued, amended, or repealed; (b) maintenance of a publicly available petition file; and (c) provision for prompt notification to the petitioner of the action taken on the petition, with a summary explanatory statement.

2. In addition, agencies should, where appropriate and feasible:

a. make their petition procedures expressly applicable to all types of rules the agency has authority to adopt;

b. provide guidance on the type of data, argumentation, or other information the agency needs to consider petitions;

c. develop effective methods for providing notice to interested persons that a petition has been filed and identify the agency office or official to whom inquiries and comments should be made; and,

d. establish internal management controls to assure the timely processing of petitions for rulemaking, including deadlines for completing interim actions and reaching conclusions on petitions and systems to monitor compliance with those deadlines.

RECOMMENDATION 86-7:
CASE MANAGEMENT AS A TOOL FOR IMPROVING AGENCY ADJUDICATION

Reducing the delay, expense and unproductive legal maneuvering found in many adjudications is recognized as a crucial factor in achieving substantive justice. In recent years, the negative side effects of civil litigation and agency adjudication procedures have begun to receive increased attention, and many judges, informed scholars and other experienced observers now cite lawyer control of the pace and scope of most cases as a major impediment. In the federal judicial sphere, and increasingly in the state judiciary, a consensus is developing that efficient case management is part of the judicial function, on a par with the traditional duties of offering a fair hearing and a wise, impartial decision. Many federal district judges have begun to practice and advocate increased intervention to shape and delimit the pretrial or prehearing process.

Some federal agencies have begun to make regular use of case management processes wherein those who decide cases interject their informed judgment and experience early in the pretrial stage, and consistently thereafter, to move cases along as quickly as possible within the bounds of procedural fairness. One such agency is the Department of Health and Human Services ("HHS"), whose Departmental Grant Appeals Board ("DGAB" or "Board") makes active, planned use of special managerial procedures. The Board, which decides cases brought by state and local governments or other recipients of HHS grant funds, has a three-tiered process that relies extensively on use of action-forcing procedures for completing each stage of a case. The Board adjudicates almost all its cases--well over two hundred dispositions and one hundred written decisions annually with an average "amount in controversy" in excess of one million dollars--in three to nine months. Most disputes before it involve financial issues concerning the allowability of grantee expenditures, but the Board's jurisdiction extends also to disputes over grant terminations and some renewals. A recent study[1] indicates that the Board's process reduces the opportunity for maneuvering by the parties, facilitates an expeditious, inexpensive disposition of all but the most complex cases, and is overwhelmingly approved by most attorneys who practice before it.

The Board's success should not be discounted because won in an environment unusually favorable to efficient dispute resolution.[2] The fact is that similar procedures are now used with apparently equal success at other agencies. They merit the attention of appeals boards, administrative panels, administrative law judges ("ALJs") and all others involved in the decisional process. Though recognizing that many factors affect the procedures to be followed in any particular dispute, the Administrative Conference encourages this trend toward reducing the transaction costs of agency proceedings and believes that this is a key responsibility of all presiding officers and their supervisors. The Conference has, in several contexts, already called on federal agencies to make greater use of internal time limits,[3] alternative means of dispute resolution,[4] and case management and other techniques[5] to expedite and improve their case handling. The Conference now calls upon all personnel who conduct or oversee processing of adjudicative proceedings for the federal government to make more determined efforts to use the kinds of case management methods described below as may be appropriate.

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[1] This recommendation is based largely on the report "Model for Case Management: The Grant Appeals Board" by Richard B. Cappalli (1986), which explores how the methods described separately below interact in an integrated case management system.

[2] *E.g.*, a moderate caseload per judge, a shared program objective among all parties and a long-term relationship between the agency and the claimant.

[3] Recommendation 78-3 calls on all agencies to use particularized deadlines or time limits for the prompt disposition of adjudicatory and rulemaking proceedings, either by announcing schedules for particular cases or adopting rules with general timetables for their various categories of proceedings. *Time Limits on Agency Actions*, 1 CFR § 305.78-3. The Conference has also called on agencies to establish productivity norms and otherwise exercise their authority to prescribe procedures and techniques for accurate, expeditious disposition of Social Security claims and disputes under grants. *E.g.*, *Procedures for Determining Social Security Disability Claims*, 1 CFR § 305.78-2; *Resolving Disputes under Federal Grant Programs*, 1 CFR § 305.82-2.

RECOMMENDATION

The Conference encourages the prompt, efficient and inexpensive processing of adjudicative proceedings. Federal agencies engaged in formal and informal adjudication should consider applying the following case management methods to their proceedings, among them the following:

1. ***Personnel management devices.*** Use of internal agency guidelines for timely case processing and measurements of the quality of work products can maintain high levels of productivity and responsibility. If appropriately fashioned, they can do so

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[4] Recommendation 86-3 calls on agencies to make greater use of mediation, negotiation, minitrials, and other "ADR" methods to reduce the delay and contentiousness accompanying many agency decisions. *Agency Use of Alternative Means of Dispute Resolution*, 1 CFR § 305.86-3. The Conference has called previously for using mediation, negotiation, informal conferences and similar innovations to decide certain kinds of disputes more effectively. *E.g.*, *Procedures for Negotiating Proposed Regulations*, 1 CFR §§ 305.82-4, .85-5; *Negotiated Cleanup of Hazardous Waste Sites Under CERCLA*, 1 CFR § 305.84-4; *Resolving Disputes under Federal Grant Programs*, 1 CFR § 305.82-2.

[5] Many of the practices recommended herein reflect the advice contained in the *Manual for Administrative Law Judges*, prepared for the Conference by Merritt Ruhlen. Recommendation 73-3 advises on using case management in adjudicating benefit and compensation claims. It calls for continuous evaluation of adjudicative performance pursuant to standards for measuring the accuracy, timeliness and fairness of agency procedures. *Quality Assurance Systems in the Adjudication of Claims of Entitlement to Benefits or Compensation*, 1 CFR § 305.73-3. In addition, Recommendation 69-6 urges agencies to compile and use statistical caseload data about their proceedings. *Compilation of Statistics on Administrative Proceedings by Federal Department and Agencies*, 1 CFR § 305.69-6.

without compromising independence of judgment. Agencies possess and should exercise the authority, consistent with the ALJ's or other presiding officer's decisional independence, to formulate written criteria for measuring case handling efficiency, prescribe procedures, and develop techniques for the expeditious and accurate disposition of cases. The experiences and opinions of presiding officers should play a large part in shaping these criteria and procedures. The criteria should take into account differences in categories of cases assigned to judges and in types of disposition (e.g., dismissals, dispositions with and without hearing). Where feasible, regular, computerized case status reports and supervision by higher level personnel should be used in furthering the systematic application of the criteria once they have been formulated.

2. ***Step-by-step time goals.*** Case management by presiding officers and their supervisors should be combined with procedures designed to move cases promptly through each step in the proceeding. These include (a) a program of step-by-step time goals for the main stages of a proceeding, (b) a monitoring system that pinpoints problem cases, and (c) a management committed to expeditious processing. Time guidelines should be fixed in all cases for all decisional levels within the agency, largely with the input of presiding officers and others affected. While the guidelines should be flexible enough to accommodate exceptional cases and should maintain their non-obligatory nature, they should be sufficiently fixed to keep routine items moving and ensure that any delays are justified. Agencies should encourage a management commitment by including specific goals or duties of timely case processing in pertinent job descriptions.

3. ***Expedited options.*** Agencies should develop, and in some instances require parties to use, special expedited procedures. Different rules may need to be developed for handling small cases as well as for larger ones that do not raise complex legal or factual issues.

4. ***Case file system.***

(a) Agencies should develop procedures to ensure early compilation of relevant documents in a case file. This will help the presiding officer delineate the legal and factual issues, the parties' positions and the basis for the action as promptly as possible. The presiding officer may then structure the process suitably and issue preliminary management directives.

(b) Disputes preceded by party interactions or investigations which create a substantial factual record, as in most contract and grant disputes, are especially amenable to this approach. Cases involving strong fact conflicts or in which data are peculiarly within the possession of one party who has motivations to suppress them may be less suitable for a case file system.

5. *Two stage resolution approaches.* In proceedings where the case file system is less appropriate, as where factual conflicts render discovery important, agencies should consider using a two-phase procedure.

(a) Phase one might be an abbreviated discovery phase directed by a responsible official, with the product of that discovery forming the "appeal file" for the next phase. Alternatively, parties could be channeled into a private dispute resolution mode, such as mediation, negotiation or arbitration, which, even if unsuccessful, can serve to define major issues and to advance development of the record. Before employing this alternative, agencies would have to determine whether the confidentiality rule that normally attaches to arbitration, mediation and negotiation is so critical that it cannot be abandoned for the sake of a more efficient second stage.

(b) A second stage, if necessary, should proceed under active case management, as recommended.

6. *Seeking party concessions and offering mediation.* Presiding officers should promote party agreement and concessions on procedural and substantive issues, as well as on matters involving facts and documents, to reduce hearing time and sometimes avoid hearings altogether. Agencies should also (a) encourage decisional officers to resolve cases (or parts thereof) informally, (b) provide their officers training in mediation and other ADR methods, and (c) routinely offer parties the services of trained mediators.

7. *Questioning techniques.*

(a) Requests for clarification or development of record. If a party makes a statement in a notice of appeal, brief, or other submission which a presiding officer does not understand, doubts, or wishes clarified, the officer should consider requiring the party to expand upon its position. The ambiguity may relate to a factual matter, or an interpretation of a legal precedent or a document. Similarly, by preliminary study of the case file, the presiding officer could identify missing information and require the party with access to such information to remedy the deficiency. The officer could also issue "invitations to brief" difficult questions of statutory interpretation or the like.

(b) Written questions for conference or hearing. The presiding officer should manage cases so as to limit issues, proof, and argument to core matters. Having ascertained the factual and legal ambiguities in each side's case by careful study of the briefs and documentation submitted, the presiding officer should structure a prehearing conference or hearing as a forum for addressing these ambiguities by seeking responses to carefully formulated questions and providing appropriate opportunity for rebuttal. In this way, and by otherwise seeking to identify the specific questions in dispute early on, the presiding officer would focus parties' attention on key issues and deflect unproductive procedural maneuvers.

8. *Time extension practices.* Time extensions should be granted only upon strong, documented justification. While procedural fairness mandates that deadlines may be extended for good cause, presiding officers should be aware that casual, customary extensions have serious negative effects on an adjudicatory system, its participants, and those wishing access thereto. Stern warnings accompanying justified extensions have had good success in curtailing lawyers' requests for additional time.

9. *Joint consideration of cases with common issues.* Whenever practicable and fair, cases involving common questions of law or fact should be consolidated and heard jointly. Consolidation could include unification of schedules, briefs, case files and hearings.

10. *Use of telephone conferences and hearings.* Presiding officers should take full advantage of telephone conferences as a means to hear motions, to hold prehearing conferences, and even to hear the merits of administrative proceedings where appropriate. While telephone conferences may be either employed regularly for handling selected matters or limited to a case-by-case basis at the suggestion of the presiding officer or counsel, experience suggests that maximum benefits are derived when telephone conferences are made presumptive for certain matters.

11. *Intra-agency review.* Any subsequent intra-agency review of an initial adjudicative decision should generally be

conducted promptly pursuant to flexible, preestablished time guidelines and review standards.

12. *Training.* Agencies should offer, and presiding officers seek, training in case management, mediation, negotiation and similar methods, and should be alert to take advantage of them. The training should be carried out with the advice and aid of other federal agencies and groups with expertise.

RECOMMENDATION 86-8:

ACQUIRING THE SERVICES OF "NEUTRALS" FOR ALTERNATIVE MEANS OF DISPUTE RESOLUTION

The Administrative Conference has repeatedly encouraged agencies to take advantage of mediation, negotiation, minitrials, binding arbitration and other alternative means of dispute resolution ("ADR").[1] While some agencies have begun to employ these methods to reduce transaction costs and reach better results, many disputes are still being resolved with unnecessary formality, contentiousness and delay. This recommendation is aimed at helping agencies begin to explore specific avenues to expand their use of ADR services.

A key figure in the effective working of various modes of ADR, including negotiated rulemaking, is the "neutral"--a person, usually serving at the will of the parties, who generally presides and seeks to help the parties reach a resolution of their dispute.

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[1] In Recommendation 86-3, the Conference called on agencies, where not inconsistent with statutory authority, to adopt alternatives to litigation and trial-type hearings such as mediation, minitrials, arbitration and other "ADR" methods. *Agencies' Use of Alternative Means of Dispute Resolution*, 1 CFR § 305.86-3. In the rulemaking sphere, Recommendations 82-4 and 85-5 have been instrumental in promoting agency experimentation with negotiated rulemaking, which involves convening potentially interested parties to negotiate the details of a proposed rule. *Procedures for Negotiating Proposed Regulations*, 1 CFR §§ 305.82-4 and .85-5. *See also*, *Negotiated Cleanup of Hazardous Waste Sites Under CERCLA*, 1 CFR § 305.84-4; *Resolving Disputes Under Federal Grant Programs*, 1 CFR § 305.82-2; and *Case Management as a Tool for Improving Agency Adjudication*, 1 CFR § 305.86-7.

These neutrals, often highly skilled professionals with considerable training in techniques of dispute resolution, can be crucial to using ADR methods with success.[2] For agencies to use ADR effectively, they should take steps to develop routines for deciding when and how these persons can be employed, to identify qualified neutrals, and to acquire their services.

The diversity of roles played by neutrals and the uncertainty as to certain applicable legal requirements present complications for agencies considering uses of ADR. Neutrals may be specially trained and accredited, or may simply hold themselves out as having certain expertise, experience or credibility. They may be called on to make binding decisions, consistent with applicable statutory and regulatory requirements, when opposing positions cannot be reconciled, or they may simply render advice to the parties. Time may be of the essence in acquiring their services, as in many arbitrations, but in some instances may be a minor consideration. Costs of using outside neutrals may range from a few thousand dollars (for the services of a minitrial advisor) to six figures (for convening and facilitating a large-scale negotiated rulemaking). These differences render specific advice difficult to give in advance. Agencies, Congress, courts, and others who employ ADR methods or review their use should nonetheless observe certain guidelines intended to accomplish the following goals:

- **Supply.** Broadening the base of qualified, acceptable individuals or organizations, inside and outside the government, to provide ADR services.

- **Qualifications.** Insuring that neutrals have adequate skills, technical expertise, experience or other competence necessary to promote settlement, while avoiding being too exclusive in the selection process.

- **Acquisition.** Identifying existing methods, or developing new techniques, for expeditiously acquiring the services of neutrals at a reasonable cost and in a manner which (a) insures a full and open opportunity to compete and (b) enables agencies to select the most qualified person to serve as a neutral, given that the protracted nature of the government procurement process is often inconsistent with the goals of ADR and the need to avoid delays.[3]

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[2] *See* the Glossary in the Appendix for brief descriptions of the roles of neutrals in various proceedings.

- **Authority.** Minimizing any uncertainty under the "delegation" doctrine or similar theories that may adversely affect the authority of some neutrals to render a binding decision. This consideration, however, should not prove troublesome where neutrals merely aid the parties in reaching agreement (as in nearly all mediations, minitrials and negotiated rulemakings).

These proposals are intended to help agencies meet the challenge of reaching these goals in a time of reduced resources and in a milieu in which many affected interests may oppose change.

RECOMMENDATION

A. Availability and Qualifications of Neutrals

1. Agencies and reviewing bodies should pursue policies that will lead to an expanded, diverse supply of available neutrals, recognizing that the skills required to perform the services of a dispute resolution neutral will vary greatly depending on the nature and complexity of the issues, the ADR method employed, and the importance of the dispute. Agencies should avoid unduly limiting the pool of acceptable individuals through the use of overly restrictive qualification requirements, particularly once agencies have begun to make more regular use of ADR methods. While skill or experience in the process of resolving disputes, such as that possessed by mediators and arbitrators, is usually an important criterion in the selection of neutrals, and knowledge of the applicable statutory and regulatory schemes may at times be important, other specific qualifications should be required only when necessary for resolution of the dispute. For example:

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[3] While there may be situations in which agencies can obtain the services of a qualified outside neutral without following formal procurement procedures, acquisitions of neutrals' services are generally governed by the Competition in Contracting Act, Pub. L. No. 98-369, Title VII, 98 Stat. 1175, which mandates full and open competition for contracts to supply goods and services to the federal government, and the Federal Acquisition Regulation, 48 CFR Chapter 1, Parts 1-53, which sets forth detailed procedures for conducting competitive procurements.

(a) Agencies should not necessarily disqualify persons who have mediation, arbitration or judicial experience but no specific experience in the particular ADR process being pursued.

(b) While agencies should be careful not to select neutrals who have a personal or financial interest in the outcome, insisting upon "absolute neutrality"--*e.g.*, no prior affiliation with either the agency or the private industry involved--may unduly restrict the pool of available neutrals, particularly where the neutral neither renders a decision nor gives formal advice as to the outcome.

(c) Agencies should insist upon technical expertise in the substantive issues underlying the dispute or negotiated rulemaking only when the technical issues are so complex that the neutral could not effectively understand and communicate the parties' positions without it.

2. Agencies should take advantage of opportunities to make use of government personnel as neutrals in resolving disputes. These persons may include agency officials not otherwise involved in the dispute or employees from other agencies with appropriate skills, administrative law judges, members of boards of contract appeals, and other responsible officials. The Administrative Conference, Federal Mediation and Conciliation Service ("FMCS"), the Department of Justice (particularly the Community Relations Service ("CRS")) and other interested agencies should work to encourage imaginative efforts at sharing the services of federal "neutrals," to remove obstacles to such sharing, and to increase parties' confidence in the selection process.

3. Congress should consider providing FMCS, CRS and other appropriate agencies with funding to train their own and other agencies' personnel in the particular skills needed to serve in minitrials, negotiated rulemakings, and other ADR proceedings.

4. The Administrative Conference, in consultation with FMCS, should assist other agencies in identifying neutrals and acquiring their services and in establishing rosters of neutral advisors, arbitrators, convenors, facilitators, mediators and other experts on which federal agencies could draw when they wished. The rosters should be based, insofar as possible, on full disclosure of relevant criteria (education, experience, skills, possible bias, and the like) rather than on strict requirements of actual ADR experience or professional certification. Agencies should also consider using rosters of private groups (*e.g.*, the American Arbitration Association). The Conference, FMCS or another

information center should routinely compile data identifying disputes or rulemakings in which neutrals have participated so that agencies and parties in future proceedings can be directed to sources of information pertinent to their selection of neutrals.

5. Agencies should take advantage of opportunities to expose their employees to ADR proceedings for training purposes, and otherwise encourage their employees to acquire ADR skills. Employees trained in ADR should be listed on the rosters described above, and their services made available to other agencies.

B. Acquiring Outside Neutrals' Services

1. In situations where it is necessary or desirable to acquire dispute resolution services from outside the government, agencies should explore the following methods:

(a) When authorized to employ consultants or experts on a temporary basis (e.g., 5 U.S.C. § 3109), agencies should consider utilizing that authorization in furtherance of their ADR or negotiated rulemaking endeavors.

(b) Agencies contemplating ADR or negotiated rulemaking projects involving private neutrals should, as part of their acquisition planning process pursuant to the Federal Acquisition Regulation ("FAR") Part 7,[4] periodically give notice in the *Commerce Business Daily* and in professional publications of their needs and intentions,[5] so as to allow interested organizations and individual ADR neutrals to inform the agency of their interest and qualifications.

(c) Where speed is important and the amount of the contract is expected to be less than $25,000, agencies should use the streamlined small purchase procedures of Subpart 13.1 of the

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[4] 48 CFR Part 7.

[5] Agencies are required to give *Commerce Business Daily* notice for all contract solicitations in which the government's share is likely to exceed $10,000. 15 U.S.C. § 637(e); 48 CFR § 5.201(a). For procurements between $10,000 and $25,000 in which the agency reasonably expects to receive at least two offers, no such notice is required. Pub. L. No. 99-591, October 18, 1986, Title IX, Section 922.

Federal Acquisition Regulation[6] in acquiring the services of outside neutrals, particularly minitrial neutral advisors, mediators and arbitrators.

(d) Agencies that foresee the need to hire private neutrals for numerous proceedings should consider the use of indefinite quantity contracts as vehicles for identifying and competitively acquiring the services of interested and qualified neutrals who can then be engaged on an expedited basis as the need arises. Agencies should, where possible, seek contracts with more than one supplier. In fashioning such indefinite quantity contracts, agencies should take care to comply with the following:

> (1) Agency contracts should specify a minimum quantity, which could be a non-nominal dollar amount rather than a minimum quantity of services.[7]
>
> (2) Negotiation of individual orders under the contract is desirable, but should generally adhere to the personnel, statements of work, and cost rates or ceilings set forth in the basic indefinite quantity contract, so as to minimize "sole source" issues.

(e) Agencies should also consider:

> (1) Entering into joint projects for acquiring neutrals' services by using other agencies' contractual vehicles.
>
> (2) Using other contracting techniques, such as basic ordering agreements and schedule contracts, where appropriate to meet their needs for neutrals' services.
>
> (3) Proposing a deviation from the FAR or amending their FAR supplements, where appropriate.

(f) Agencies should evaluate contract proposals for ADR neutrals' services on the qualifications of the offeror, but cost alone should not be the controlling factor.[8]

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[6] 48 CFR Subpart 13.1. This Subpart allows agencies to make purchases in amounts less than $25,000 without following all of the formalities prescribed in the FAR for ordinary procurements. If the procurement is for less than $10,000, the agency need not advertise it in advance in the *Commerce Business Daily*. 48 CFR § 5.201(a). None of these provisions relieves the agency of its mandate to obtain competition.

[7] 48 CFR § 16.504(a)(2).

[8] 48 CFR § 15.605(c).

2. The Civilian Agency Acquisition Council and Defense Acquisition Regulatory Council should be receptive to agency or Administrative Conference proposals for deviations from,[9] or amendments to, the FAR to adapt procurement procedures to the unique requirements of ADR processes, consistent with statutory mandates.

3. In the absence of appropriate considerations suggesting a different allocation of costs, in minitrials and arbitration the parties customarily should share equally in the costs of the neutrals' services.

Glossary

Mediator. A mediator is a neutral third party who attempts to assist parties in negotiating the substance of a settlement. A mediator has no authority to make any decisions that are binding on either party.

Convenor/Facilitator. Negotiated rulemakings generally proceed in two phases, one using a "convenor" and the other a "facilitator." In the first (convening) phase, a neutral called a convenor studies the regulatory issues, attempts to identify the potentially affected interests, and then advises the agency concerning the feasibility of convening representatives of these interests to negotiate a proposed rule. If the agency decides to go forward with negotiating sessions, the convenor assists in bringing the parties together. In the second (negotiating) phase, a neutral called a facilitator manages the meetings and coordinates discussions among the parties. When the parties request, a facilitator may act as a mediator, assisting the negotiators to reach consensus on the substance of a proposed rule. The roles of convenor and facilitator sometimes overlap, and often both functions are performed by the same person or persons. Neither a convenor nor a facilitator has authority to make decisions that are binding on the agency or on the participating outside parties.

Neutral Advisor. A minitrial is a structured settlement process in which each party to a dispute presents a highly abbreviated summary of its case before senior officials of each party authorized to settle the case. In this recommendation, it is presumed that the government is one party to the dispute. In some (but not all) minitrials, a neutral advisor participates by hearing the presentations of the parties and, optionally, providing further assistance in any subsequent attempt to reach a settlement. Typically, a neutral advisor is an individual selected by the parties. Duties of a neutral advisor may include presiding at the presentation, questioning witnesses, mediating settlement negotiations, and rendering an advisory opinion to the parties. In no event does a neutral advisor render a decision that is binding on any party to a minitrial.

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[9] 48 CFR § 1.402.

Arbitrator. An arbitrator is a neutral third party who issues a decision on the issues in dispute after receiving evidence and hearing argument from the parties. Arbitration is a less formal alternative to adjudication or litigation, and an arbitrator's decision may or may not be binding. Arbitration may be chosen voluntarily by the parties, or it may be required by contract or statute as the exclusive dispute resolution mechanism.

BACKGROUND REPORTS
FOR
RECOMMENDATIONS
86-1 THROUGH 86-8

BACKGROUND REPORT FOR RECOMMENDATION 86-1

NONLAWYER ASSISTANCE TO INDIVIDUALS IN FEDERAL MASS JUSTICE AGENCIES: THE NEED FOR IMPROVED GUIDELINES

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Report to the Administrative Conference of the United States
June 1, 1986

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I. Summary

At the request of the Administrative Conference of the United States (ACUS), a study was undertaken of so-called "mass justice" agencies - that is, agencies having a high volume of individual and family claims, applications or disputes. The purpose of the study was to make findings and recommendations with respect to mass justice agencies on the following matters:

1. To what extent individuals are not assisted or represented by anyone (exclusive of agency personnel) and the resulting ramifications for efficient and fair agency process;

2. To what extent individuals are assisted or represented by nonlawyers and to what extent by lawyers; the skills, training and experience each group is required by agency rules to have and in fact possesses; the functions each group performs; and the differing results, if any.

3. To what extent agency rules encourage or discourage nonlawyer assistance and representation and what the justifications are for such rules.

4. To what extent federal and state laws or professional codes of ethics encourage or discourage nonlawyer assistance and representation to those involved in federal agency proceedings, and the underlying rationale for them.

Two mass justice agencies were selected for intensive study: The Social Security Administration and the Immigration and Naturalization Service. In addition, relevant procedures of the Veterans Administration and the Internal Revenue Service were also examined for comparison purposes.[1] Interviews of participants in federal agency proceedings were largely conducted in the ten-month period between May 1, 1985 and February 28, 1986. These included interviews of federal agency officials as well as interviews with a number of private nonprofit legal aid and social services agencies which, directly or indirectly, provide lawyer and nonlawyer professional assistance in mass justice agency proceedings.[2]

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[1] Although the focus of this study is mass justice agencies, reference has also been made as appropriate to existing literature on nonlawyer assistance in non-mass justice agency proceedings (such as Professor Jonathan Rose's unpublished study for ACUS on economic regulatory proceedings entitled Representation by Nonlawyers in Federal Administration Agency Proceedings: An Expanded Role, submitted to ACUS April 9, 1984).

A considerable amount of material bearing on the subject of this study has been published in the past. In order not to duplicate past effort, this study has collated and drawn extensively upon the investigations of others, most notably, the survey of federal agencies published in February, 1985 by the American Bar Association's Standing Committee on Lawyers' Responsibility for Client Protection and The American Bar Association Center for Professional Responsibility. A copy of the American Bar Association report is attached to this draft as Appendix A.

This study has resulted in the following findings and conclusions:

(1) A large number of individuals involved in federal mass justice agency proceedings have unmet needs for assistance at all levels of agency process, but particularly assistance with filling out forms and attending informal interviews and conferences prior to any formal proceeding where a formal appearance of counsel or representative is made. From an agency point of view, persons who are unassisted at the early stages are more likely than not to cause a loss of agency efficiency because they are likely to require more time, effort and help on the part of the agency's staff than those who are otherwise assisted. The existing pool of lawyers is inadequate to meet either all the early stage needs for assistance or the later stage needs for representation of low and moderate income persons. The absence of adequate assistance and representation resources is

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[2] Interviews were conducted with the directors and a cross section of nonlawyer professional staff members of the following private non-profit organizations: AYUDA; Alien Rights Project of the Washington Lawyers' Committee; Migrant Legal Action Project; American Association of Retired Persons' Legal Counsel for the Elderly Department; National Senior Citizens Law Center; National Council for Senior Citizens; George Washington Law School Paralegal Institute for Seniors; George Washington Law School clinics on disability benefits and immigration matters; Neighborhood Legal Services Program; The Legal Aid Society; Family and Child Services; Iona House; Antioch Law School clinics on paralegal advocacy, government benefits, and immigration matters; Women's Legal Defense Fund; Catholic University legal services clinic; District of Columbia Citizens Complaint Center; National Paralegal Association (volunteer program); Pro bono Coordinator's office of the D.C. Bar; Lawyer Referral and Information Service of the D.C. Bar; Disabled American Veterans; American University Law School Clinic on Veterans Laws; National Organization of Social Security Claimants' Representatives.

Assistance in collecting statistical and other agency data and in interviewing participants in federal agency proceedings was provided by Majel Stein, who was a law student at the time at George Mason Law School and is currently a law student at the University of Virginia Law School.

particularly acute for working poor and moderate income persons who ordinarily do not qualify for free assistance from legal aid organizations, and who are frequently unable to afford the prevailing market fees of lawyers.

(2) Statistical evidence indicates that in agency hearings unrepresented persons are less likely to obtain favorable decisions than those who are represented. Those individuals in mass justice agency hearings who are currently represented by nonlawyers achieve results only slightly less favorable than those achieved by individuals who are represented by lawyers, and they achieve results which are significantly more favorable to them than those individuals who are completely unrepresented. This evidence, together with subjective opinion evidence that in mass justice agency proceedings nonlawyers generally perform the same functions at many levels of the agency process as lawyers, and perform them well, leads to the conclusion that nonlawyer professionals as a class are able to provide competent assistance to individuals at many levels of mass justice agency proceedings.

(3) Mass justice agency regulations and practice do not entirely prohibit nonlawyer assistance, but neither do they encourage nonlawyer assistance as much as they might, consistent, of course, with legitimate agency interests in regulating the qualifications and ethical conduct of agency practitioners. In some agencies, nonlawyer assistance is encouraged only when it is provided free of charge (usually to relatives, friends, or poor persons). These agencies fail to maximize the potential for increased nonlawyer professional assistance to working poor and moderate income persons who can afford to pay modest fees because they fail to provide nonlawyer professionals with adequate protection from prosecution under state unauthorized practice laws. State unauthorized practice laws, and the fear of prosecution under those laws, were found by this study to be the single most chilling deterrent to the development of an increased pool of nonlawyer professionals to assist moderate income individuals involved in mass justice agency proceedings.

While nonlawyer professionals who provide assistance for fee to moderate income persons are adequately protected against state prosecution for unauthorized practice under the regulations of some agencies (the Internal Revenue Service, for example) they are not protected at all under other agency regulations (for example, those of the Immigration and Naturalization Service). In addition, even when agency regulations permit nonlawyer practice for a fee (as do those of the Social Security Administration) the long history of unauthorized practice enforcement in the states, and the uncertainty about the federal government's policy towards that enforcement, has acted as a practical deterrent to the development of nonlawyer professional practice.

(4) Under the federal preemption doctrine articulated by the Supreme Court in Sperry v. Florida ex rel Florida Bar, 373 U.S. 379 (1963), nonlawyers can be protected from prosecution under state unauthorized

practice laws for their federal agency practice activity, but only if agency regulations unambiguously authorize the activity to be carried on in the respective states. This federal preemptive protection is particularly needed for those nonlawyer professionals who are, or might be, willing to provide assistance for fee to moderate income persons.

(5) Individual mass justice agencies probably have implied authority to issue regulations authorizing increased nonlawyer representation. Even if they do not have implied authority, it is probable that Section 555(b) of the Administrative Procedure Act provides sufficient legislative authority for agencies to authorize increased nonlawyer representation. However, given the uncertainty and fears about the enforcement of state unauthorized practice laws, and the fact that Section 555(b) is not crystal clear facially, it may be prudent and useful to amend the language of Section 555(b) itself to emphasize that nonlawyer agency practice is authorized under the Administrative Procedure Act. It may also be helpful to amend Section 555(b) to make it unambiguously clear that those nonlawyers who are admitted to practice by an agency are authorized to do all that is necessary and incidental to that practice in their respective states.

(6) Federal mass justice agencies currently utilize a range of admission criteria and other measures to ensure that individual nonlawyer practitioners meet agency standards of competence at various stages of agency process according to the particular objectives and needs of the respective agencies. These mechanisms are generally workable and should be left, as they now are, to individual agency determination, according to each agency's own particular objectives and needs. Agencies should be urged, however, to review their regulations governing competence towards the goal of increasing the pool of nonlawyer representatives who can competently provide assistance at all levels of agency proceeding where nonlawyer assistance is determined by an agency to be feasible.

(7) Agencies should review their rules of practice that deal with attorney misconduct (such as those dealing with negligence, fee gouging, fraud, misrepresentation and representation when there is a conflict of interest) to ensure that similar rules are made applicable to nonlawyers. In addition, agencies should ensure that effective agencies procedures are established for adequate enforcement of those rules of practice including agency procedures for receiving complaints from the public.

II. Large Numbers of Individuals Involved in Federal Mass Justice Agency Proceedings Have Unmet Needs for Assistance

The principal engagement between an ordinary citizen and a federal agency concerning a claim, application or dispute is most likely to occur in a mass justice agency. From the viewpoint of the ordinary citizen or resident seeking disability or retirement benefits, adjustment of alien status to citizenship, or refund of taxes, each mass justice agency decision affecting his claim or dispute is of great personal importance. And from the individual's point of view, assistance from knowledgeable sources in presenting the claim or application, or pressing the individual's side of the dispute, may also be of great importance. In fact, there is statistical evidence that represented individuals in mass justice agency proceedings are more likely to prevail than unrepresented ones.[3]

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[3] For a statistical study concluding that represented individuals are more likely to prevail than unrepresented ones in informal nonadversarial proceedings of agencies dispensing disability benefits, and for a discussion of some of the costs and benefits of providing that representation, *see* Popkin, *The Effect of Representation in Nonadversary Proceedings - A Study of Three Disability Programs*, 62 Cornell L.Rev. 990 (1977) (This 1977 study found, for example, that in Federal Employees' Compensation Act proceedings, represented claimants had an advantage of up to 28% at the hearing stage.)

More recent statistical data compiled by the Social Security Administration reveals that in fiscal year 1983, unrepresented persons prevailed in 14.4% fewer request for hearing matters than those who were represented. *See* Office of Hearing Appeals' survey: *Participant Involvement in Request for Hearing Cases For Fiscal Year 1983*, May 1984, attached to this paper as Appendix B, and discussion of that survey, in the text at note 42, *infra*.

Veterans Administration data also reveals that unrepresented persons are slightly less likely to prevail before the Board of Veterans Appeals than those represented by attorneys or nonprofit service organizations which prevail in 3% to 1.5% more matters respectively. These Veterans Administration statistics are cited in the Supreme Court's decision in *Walters v. National Association of Radiation Survivors*, 105 S.Ct. 3180, 3193 (1985). (Win rates before the Veterans Board of Appeals by any category of representative are significantly lower than those before review boards of other agencies, ranging only between 15% and 18%. By statute, there is no judicial review of Veterans Board decisions.)

By statute, no one may charge veterans a fee of more than $10 in disability benefit proceedings. 32 U.S.C. 3404(C). The *Walters* case, *id.*, involved a challenge to the $10 fee cap on the ground that the cap effectively precluded availability of lawyers to provide representation as a

At the same time, from the viewpoint of government policymakers, the federal mass justice agency decision system is on overload, and there seems to be no end in sight to the ever mounting numbers. The Social Security Administration, for example, in fiscal year 1983 experienced a 13% caseload increase over fiscal year 1982 at all levels of hearings and appeals, resulting in a total of 362,223 requests for hearings. Federal court litigation also increased by 97% over the previous year as 23,690 new cases were filed. (Disability litigation comprised 98% of the new litigation.) Non-litigated applications for social security benefits have also increased as several hundred thousand new beneficiaries have been added to the rolls, bringing the total beneficiaries from 35.6 million in 1982 to an estimated 36.3 million in 1984.[4] The Veterans Administration decides approximately

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practical matter and was, therefore, unconstitutional. The court upheld the fee limitation because it found that the record did not demonstrate that veterans were harmed by nonlawyer representation in administrative agency proceedings before the Veterans Administration. Justice Stevens dissented and argued that whether or not lawyers would be more successful in those proceedings, the fee limitation interfered with the free choice of representative, and that that interference was both harmful and an unconstitutional infringement of individual liberty.

The Immigration and Naturalization Service does not maintain records concerning representation in INS proceedings. Knowledgeable persons in non-profit agencies serving aliens stated that it was their experience that represented persons more often prevailed than those who were unrepresented. (See note 2 supra for a list of agencies surveyed.)

Unrepresented litigants are also less likely to prevail in judicial proceedings. A study of 87 "conventional" civil actions filed by indigents in the United States District Court for the District of Columbia between 1960 and 1964 showed that those indigent civil plaintiffs who represented themselves were twice as unlikely than represented indigents to survive a motion to dismiss on the pleadings and almost nine times less able to achieve a settlement. Moreover, these pro se plaintiffs had no chance of obtaining discovery and were not among the four plaintiffs who reached a trial on the merits. See Schmertz, The Indigent Civil Plaintiff in the District of Columbia: Facts and Commentary, 27 FED. B.J. 235, 241-43 (1967). Another four-city study found that civil defendants represented by counsel are almost six times more likely to succeed than those unable to obtain counsel. See Johnson, Thrown to the Lions, A Plea for a Constitutional Right to Counsel for Low-Income Civil Litigants, 4 Bar Leader 17 (ABA 1978).

[4] Department of Health and Human Services, Social Security Administration, Social Security Administration 1984 Annual Report to Congress at 15, 33, 48-49.

800,000 claims a year for service-connected disability benefits and pension claims, and about 66,000 of the claims which are denied are contested in administrative proceedings.[5] The 1983 Annual Report of the Attorney General states that 223,000 petitions for adjustment of status were considered, and the Service reported an annual caseload of 90,000 litigated matters, from administrative reviews through the federal court system.[6]

Given the size of mass justice agency caseloads, and the widely varying factual circumstances presented in the cases, it is, of course, exceedingly difficult for agencies to reach uniformly accurate and fair decisions at all stages. Errors will inevitably occur, often requiring under our present system not only administrative corrections, amendments and appeals, but also judicial review. Moreover, in some areas - disability claims, for example -the facts may change many times, thus necessitating new claims and reviews for each change in circumstance.[7]

Sources of knowledgeable assistance for the individuals involved in mass justice agency proceedings can make the correction process more efficient and fairer for both individuals and agencies. In this connection, it should be noted that individuals dealing with federal mass justice agencies need help both at the very early, nonadversarial, stages of agency process when information is collected, forms are filled out, and questions answered, and also at subsequent more formal hearing and adversarial stages. In fact, it was the consensus of those interviewed (see note 2, _supra_) that the greatest volume of need is in the early stages, well before there is any requirement for formal appearance of counsel or representative. There was also general agreement that if an individual presenting a claim or application has competent assistance at the outset, even before forms are submitted, the amount of agency time required to consider it can be reduced considerably. Ascertaining and resolving factual issues is the major part of a mass justice agency's workload, and when the individual has the benefit of knowledgeable assistance in presenting the facts clearly and in a format that is familiar to the agency, the administrative process is accelerated and the decision-maker helped to reach a correct decision initially. A clearer record is also established for any administrative review that does ensue, thus making it easier for the administrative reviewer to determine speedily the correctness of the initial decision.

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[5] Data contained in the 1978 report of the Legal Services Corporation and introduced into the record of _Walters v. National Association of Radiation Survivors_, _supra_, at 3183, the Court noting that evidence before the Court indicated that the figures remain fairly constant from year to year.

[6] Annual Report of the Attorney General (1983), 157.

[7] For a critical view of this multiplicity of review and expression of alarm over "astronomical" caseloads in social security disability proceedings, _see_ Dixon, _The Welfare State and Mass Justice: A Warning From the Social Security Disability Program_, 1972 Duke L.J. 681 (1972).

Almost 25 years ago, Allanson Willcox, General Counsel of what was then the Department of Health, Education and Welfare, acknowledged the efficacy of legal representation in administrative process generally when he addressed the 1963 annual meeting of the Virginia State Bar Association. He candidly stated:

> The fact that a citizen can retain (a lawyer) to represent him goes a long way towards assuring that he will receive the treatment to which he is entitled at the hands of a government agency. * * * I say this despite my conviction that the officials who administer local, state and federal programs would stand toward the top in competence and dedication to duty. But no one would deny that administrative agencies can and do make mistakes; as with any group, no official is infallible, and some are more fallible than others. And not infrequently a lawyer can bring out facts or considerations that the administrator with the best will in the world would otherwise overlook.

Counsel Willcox's comments focused on the help that lawyers can and do give their clients. Today there is serious debate in many quarters over the question of whether lawyers are the only professionals who can provide assistance or representation in administrative proceedings.[8] There is also continuing debate over the question of whether the traditional adversarial methods employed by lawyers are the only methods for resolving disputes (either in administrative or judicial settings.)[9]

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[8] Lay advocates who counsel and assist citizens with their administrative problems have been used with considerable success in other countries. A notable example are the 750 Citizen Advice Bureaus widely used in Great Britain. These neighborhood offices handle each year some three million requests for information and advice and are providing an increasing amount of nonlawyer representation in administrative appeal proceedings. See Sloviter, Let's Look at Citizens Advice Bureaux, 65 American Bar Association Journal 567 (1979); Zucker, Citizen's Advice Bureaus, paper presented at the Conference on the Extension of Legal Services to the Poor, Department of Health, Education and Welfare, Washington, D.C. November 12, 1964. A few comparable examples can be found scattered throughout this country. For example, the Women's Legal Defense Fund in Washington, D.C. employs nonlawyers to provide assistance and representation before administrative, prosecutorial and judicial branches of the D.C. government in cases involving battered women. Annual Report of the Women's Legal Defense Fund (1984) on file with the District of Columbia Bar Foundation. Many commentators have urged an increased use of nonlawyer professionals to provide assistance to citizens who have a wide range of administrative agency problems and also to those who have non-administrative agency disputes such as those ending up in small claims courts. See, e.g., Sparer, Thorkelson & Weiss, The Lay Advocate, 43 U.Det.L.J. 493 (1966); Zander, Legal Services for the Community (1978); Bellow, "Legal Services to the Poor: An American Report," chapter in Access to Justice and the Welfare

It is not necessary to discuss here the pros and cons of these relatively global topics. It is sufficient to focus in this paper on the fact that lawyers, even if they are to be preferred in administrative agency proceedings, are not available in adequate numbers to meet all the needs for assistance in mass justice agencies. As we shall see, there are large gaps in representation even at the hearing and adversarial stages of mass justice agency review, and there was uniform agreement among agency participants interviewed that the gaps are even larger at the more informal application and consultation stages. This does not reflect an inadequate supply of lawyers in the country but, rather, reflects an inadequate supply of lawyers under our current legal service delivery systems, to provide the assistance that poor and moderate income persons can afford for their everyday, not very remunerative (for lawyers), mass justice agency claims and applications.[10]

State, 49 (Capeletti ed. 1980); Statsky, Paralegal Advocacy Before Administrative Agencies: A Training Format, 4 Toledo L.Rev. 439 (1973).

[9] The need to explore differing methods of resolving legal disputes as an alternative to traditional adversarial methods has been a matter of well publicized discussion in recent years. See generally Goldberg, Green and Sander, Dispute Resolution (Little, Brown and Co. 1985). The American Bar Association and several courts systems, including that of the District of Columbia, are currently fostering experiments with mediation, voluntary and mandatory arbitration, and other nonadversarial programs, some of them as part of an ABA funded pilot "multidoor courthouse" program. See Edelman, Institutionalizing Dispute Resolution Alternatives, 9 Just.Sys.J. 134 (1984). The Administrative Conference of the United States adopted a recommendation in 1982 urging federal agencies to undertake experiments with mediation techniques in rulemaking procedures. As a result, several federal agencies, including the Environmental Protection Agency and the Federal Trade Commission, have done so. See ACUS Recommendation 82-4; Harter, Negotiating Regulations: A Cure For Malaise, 71 Georgetown L.J. 1 (1982).

According to experts in the field of alternative disputes, trained nonlawyer professionals are an integral part of the current development of nonadversarial alternatives. Interviews with Michael Lewis, Deputy Director, National Institute for Dispute Resolution; Linda Singer, Executive Director of the District of Columbia Center for Community Justice.

[10] Former president Carter characterized the distribution of legal services in the nation with the much publicized statement that "We are overlawyered but underrepresented." Speech to the Los Angeles County Bar Association on the occasion of its centennial celebration, 1978.

Legal services in the administrative agency field have historically been available to those who could afford to pay for them. (Those seeking a television license or an airline route, for example, have been heavy users of available legal resources.) For many years, little attention was paid to the fact that low and moderate income persons were developing increased contacts with federal and state administrative agencies and needed assistance. In the mid-1960s, attention was focused on this phenomenon and particularly on the impact of administrative decisions on the poor. Professor Edward Sparer, the director of a legal services program and a leader in the movement to provide free legal aid to the poor, wrote in 1964 that:

> No longer is the primary contact of the poor man with the law in the ordinary courtroom (criminal or otherwise) but in the anteroom of a city, state or federal agency as he awaits a determination of vital significance to him and his family.[11]

With increased national attention on the needs of the poor in the mid-1960s, new efforts were made both by government and by private social welfare agencies to provide legal aid and paralegal assistance to those who were at the bottom of the economic scale. Neighborhood legal aid programs, with monies provided by the federal Legal Services Corporation, were established in every state. However, as Derek Bok, President of Harvard University, has pointed out: "Even in its palmiest days, the Corporation was only empowered to help the poor and had money enough to address but a small fraction of the claims of even this limited constituency."[12] (Other studies, and this author's interviews with legal aid groups, confirm that legal assistance organizations serving the very poorest cannot meet all the requests for help and must frequently close their doors for intake of new cases - sometimes for months at a time.)[13]

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[11] Sparer, The New Public Law: The Relation of State Administration to the Legal Problems of the Poor, paper presented at the Conference on the Extension of Legal Services to the poor sponsored by the Department of Health, Education and Welfare, Washington, D.C., Nov. 12, 1964. See also Reich, The New Property, 73 Yale L.J. 731 (1964); Hostetler, "Poverty and the Law," chapter in Poverty As A Public Issue (ed. Seligman), p. 177 (Free Press-MacMillan) 1965.

[12] Bok, Law and Its Discontents: A Critical Look at Our Legal System, 37th Annual Cardozo Lecture, 38 Record of the Association of the Bar of the City of New York (No. 1) 12, 18 (1983). The Legal Services Corporation had estimated in 1978 that, nationally, no more than one out of seven persons qualifying under the Corporation's income standard for free legal assistance was assisted by federally funded legal service programs. The Legal Services Corporation and the Activities of its Grantees: A Fact Book (Legal Services Corporation: Spring 1979). The cuts in federal funding for the Corporation since 1978 have reduced legal aid office budgets by 25% and thus exacerbated the problem of inadequate resources for indigents.

At the same time, the legal needs of the working poor and moderate income groups have never been met by federally funded legal aid programs, and they continue to be largely ignored by federal and state policymakers (although there are some evolving experiments in the private sector with prepaid legal services and high volume clinics). As Harvard President Bok observed generally with regard to the millions of people with modest incomes, "the cost of legal services grows much faster than the cost of living * * * [and] [i]n practice most people find their legal rights severely compromised by the cost of legal services...."[14] The president of the American Bar Association recently wrote that "Many middle-income Americans ... find themselves unable to assert their legal rights because they cannot afford to do so. According to some estimates, as many as 100 million Americans find themselves in this position".[15] The high cost of lawyers is a factor frequently cited in public opinion polls as to why citizens do not make greater use of lawyers, and complaints about excessive fees comprise the largest single category of client complaints against lawyers lodged with bar disciplinary entities.[16]

As a result of the high cost of legal assistance, many of those who are neither very poor (and thus eligible for federally subsidized legal aid) nor very affluent (and thus in a financial position to purchase lawyers' services at prevailing market rates) do without legal assistance for many kinds of legal problems, including problems with administrative agencies. The American Bar Foundation conducted a survey of over 2,000 families in the mid-1970s to assess the personal, nonbusiness problems encountered by the public and their use of lawyers' services to address these problems. The survey revealed that overall less than one out of two persons who reported having had a "serious personal (nonbusiness) difficulty with a government agency" had consulted a lawyer. The survey revealed that lower-income persons were even less likely to consult a lawyer; and that over 50% of all income groups thought that lawyers charged more for their services than they were worth.[17]

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[13] Report of the Committee on Civil Legal Services of the Judicial Conference of the District of Columbia (1980) p. 13; interview with Ann Barker, Director of Public Service Activities, District of Columbia Bar.

[14] Bok, Note 12 supra, at 13.

[15] Falsgraf, "Access to Justice in 1986", ABA Journal, Feb. 1, 1986.

[16] Interview with Thomas H. Henderson, Jr., Deputy Bar Counsel, Board on Professional Responsibility, District of Columbia Bar.

While the extent of national unmet needs for assistance with legal problems generally, or with administrative problems specifically, cannot be calculated with mathematical precision, there was widespread agreement among persons interviewed for this report that the studies and estimates of need discussed above are generally accurate and that at least a substantial number of individuals who are involved in mass justice agency proceedings have unmet needs for assistance, particularly at the very early stages where forms need to be filled out and rules explained.[18] In the immigration area, estimates of need ranged between 50% and 80%. (An example of this is illustrated by a visit in connection with this report to a local office of the Immigration and Naturalization Service. Over one hundred persons, most of whom were non-english speaking, were milling around and trying to find out which of two lines to stand in to obtain or process various INS forms. It took approximately two hours or more to reach the head of the line, at which time one could finally ask whether one was in the correct line. If the individuals mistakenly stood in the wrong line (which was a common happenstance) they would then have to start all over again at the end of the other line. Several families and their children were observed to have been there nearly all day. Only one person in the room appeared to have the assistance of an English speaking advocate. There was no information or assistance desk provided either by INS or by a nonprofit agency.[19]

Similarly, it is not known how many individual applicants for social security insurance or social security disability benefits need, but do not receive, assistance at the early stages of filling out forms and amassing relevant employment, medical, and other documentary evidence. It is known that at the hearing stage, 38% of Social Security claimants were unrepresented in 1983, and that agency statistics indicate that unrepresented claimants are less likely to prevail at that stage than those who are represented.[20]

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[17] The Legal Needs of the Public: Final Report of a National Survey (ed. Curran), American Bar Foundation (1977) at pp. 115-140; 240-249. Interestingly, over 75% of all income groups thought that many things lawyers handle could be done as well and less expensively by nonlawyers.

[18] A 1980 study of the District of Columbia Court system disclosed an exceptionally high number of unrepresented persons in "mass justice" court proceedings. For example, the study disclosed that 98% of tenants in landlord-tenant court were unrepresented and that in divorce, support and custody cases, at least one party was unrepresented in 85% of the cases. Report of the Committee on Civil Legal Services of the D.C. Judicial Conference, Note 13, supra.

[19] At one time, an information and assistance desk was staffed by local nonprofit agencies, but the INS required it to be moved some months ago because of a lack of space in the room. Interviews with staff of AYUDA, note 2 supra.

By way of contrast, in the Internal Revenue Service (where federal policy has long encouraged free choice of representative, including nonlawyers) there is a whole continuum of help available to the public ranging from free assistance to all taxpayers from the IRS itself or to indigents from legal aid agencies - to tax preparation services for the middle income groups at modest fees, such as those operated by H. & R. Block and Sears Roebuck - to the more sophisticated and relatively costly help of enrolled agents, certified public accountants and lawyers - to the most rarified (and usually expensive) specialty tax law firms.

Because of what appears to be a significant volume of unmet needs for assistance in mass justice agencies, and because the Internal Revenue Service model has proven to be a highly successful method for delivering administrative agency assistance across a broad economic spectrum, increasing numbers of administrative agency officials and practitioners have suggested that the potential for increased nonlawyer assistance in mass justice agencies should be explored. Some of the suggestions have given rise to this study.[21]

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[20] See note 3, supra. Some unrepresented claimants, of course, are capable of representing themselves at hearings (and at earlier stages) and certainly all persons are entitled to do so if they so choose. In addition, some unrepresented claimants may have such frivolous appeals that no professional would be willing to provide assistance. Notwithstanding these factors, it is likely that a significant portion of those unrepresented in agency hearings would welcome assistance but are unable to obtain it at an affordable price.

Conversely, in the area of Veterans benefits, there is a long tradition of free service to veterans provided by service organizations such as the American Legion, the Disabled American Veterens and the American Red Cross. (The Veterans Administration provides free office space to those organizations.) Only 12% of claimants in V.A. hearings proceed pro se and it is generally assumed that a large portion, if not all of them, prefer to represent themselves. See Popkin, note 3, supra, and Walters v. National Ass'n of Radiation Survivors, note 4, supra, at 3184, and discussed further at note 54 of this report.

[21] See, for example, comments by several speakers at the 29th Plenary Session of the Administrative Conference of the United States held on December 6 and 7, 1984, urging the Conference to study the issue of nonlawyer representation in administrative procedure generally and in the area of mass justice particularly. 1984 Report of the Administrative Conference of the United States, at 36 (May 1984).

Another possible alternative for providing increased assistance to

It has also been suggested that an increased supply of nonlawyer professional assistants will bring down the cost of lawyers' fees.[22] This proposition is open to question - it is not apparent that "uptown" corporate law firms specializing in tax matters have reduced their hourly rates in recent years as a result of competition from H. & R. Block and Sears Roebuck. Whether or not this prognosis would prove to be true, however, it does seem likely that alternative sources of lower cost assistance will be utilized by low and moderate income persons who do not currently employ lawyers. A similar result appears to have occurred in legal areas such as divorce cases and will preparation in the aftermath of Supreme Court decisions allowing lawyer advertising.[23]

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those who are currently unrepresented is for the federal government to encourage an expanded use of lawyers. One way to accomplish this would be for the federal government to increase the budget of the Legal Services Corporation and, in addition, make moderate income persons eligible for its funded services. Another way would be for the federal government to provide additional attorney fee awards in mass justice proceedings in the expectation that this would draw increased numbers of private attorneys. However, neither of these approaches, even if they are desirable, is economically or politically viable at this time in light of the current national efforts to reduce federal budget expenditures.

Even though some attorney fee awards - those in social security disability cases, for example - can be paid out of amounts due claimants, rather than out of the public purse (except when attorney fee awards are made under the Equal Access to Justice Act), there is no pool of claimant money when the claimant is unsuccessful, when the government is seeking to recover funds from the client (as in a social security overpayment case for example) or in proceedings not involving money claims such as those in the immigration field.

[22] See, for example, Morgan, *The Evolving Concept of Professional Responsibility*, 90 Harv. L.Rev. 702 (1977).

[23] Although a Federal Trade Commission study in 1984 attempted to show that lawyers' fees came down following *Bates v. Arizona State Bar*, 433 U.S. 350 (1977) and progeny, the study in fact demonstrated only that lower priced services were available in the communities studied and not that particular lawyers had lowered their fees for their existing services, or that services requiring equivalent expertise and time were being offered for less. The real benefits that appear to have resulted from the Supreme Court's lawyer advertising decisions are (1) they allowed those lawyers already offering reduced fees (often newly minted law school graduates) to advertise that fact; and (2) they encouraged the development of new legal service delivery systems - that is, high volume, low-cost clinics - to serve low and moderate income persons who before then usually had to choose between high-cost lawyer services and doing without legal assistance.

In any event, a broadened range of assistance for individuals involved in mass justice agency proceedings - and the right to free choice of assistance at an affordable price - are likely to foster improved perceptions of fair procedure on the part of the citizenry. This is particularly true when those who are represented are more likely to prevail in agency proceedings than those who are unrepresented.[24]

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[24] See note 3, supra.

III. Nonlawyer Professionals Currently Meet Many of the Needs for Assistance of Individuals Involved in Mass Justice Agency Proceedings and As a Class Are Competent to Do So

Results of this investigation reveal that not all proceedings in mass justice agencies are so difficult or specialized that they require the specially trained skills of a lawyer. To the contrary, they reveal that many early stage proceedings are sufficiently non-complex and informal that in order to provide competent assistance, one need only be intelligent, well-versed in the subject matter and procedures of the agency in question, and experienced in providing assistance to the agency's constituency. This investigation further revealed that even in many of the later stages of agency proceedings, including adversarial proceedings, experienced nonlawyers can and do perform competently.

To begin with, investigation disclosed that nonlawyers already practice to a modest extent in almost all federal administrative agencies and do so to an even greater extent in all four of the mass justice agencies examined.[25] For example, while the Social Security Administration does not maintain statistics on nonlawyer assistance at all levels of agency process, its Office of Hearing Appeals has published data showing that in 1983 nonlawyers entered appearances as sole representatives for social security claimants in 11.2% of all request for hearing matters. (In another 1.4% of the matters, nonlawyers appeared jointly with lawyers.)[26]

The Immigration and Naturalization Service does not maintain statistics on categories of representatives, but agency officials reported that nonlawyers regularly practice in the agency at all stages, including hearings, and that applicants for adjustment of status are regularly referred by INS to social service agencies which are staffed primarily by nonlawyers.[27] The Veterans Administration statistical data shows that nonlawyers appear in representative capacities in 86% of all cases involving claims for disability benefits and appear at all stages of agency review.[28] (There is no judicial review of agency decisions.) While the Internal Revenue Service does not maintain statistical data on the category of representatives in its proceedings, it reports that several hundred thousand nonlawyers are entitled to appear before the Service, and that in fact a very large number of nonlawyers (ranging from H.R. Block tax preparers to certified public accountants) regularly appear every year. (Nonlawyers who pass an examination may also represent taxpayers in the Tax Court.)[29]

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[25] See survey conducted by the American Bar Association Standing Committee on Lawyers' Responsibility for Client Protection and the American Bar Association Center for Professional Responsibility, attached to this paper as Appendix A. Similar findings are set forth in Professor Rose's study for the Administrative Conference, Note 1, supra.

[26] Office of Hearing Appeals, Social Security Administration, Participant Involvement in Request for Hearing Cases for Fiscal Year 1983, May 1984. A copy of this statistical report is attached to this paper as Appendix B.

[27] Interviews with Yolanda Sanchez, Acting Director, Outreach Program, and J. Hurwitz, Board of Immigration Appeals for the Immigration and Naturalization Service; also see American Bar Association Committee Report, note 22, supra, set forth in Appendix A.

Investigation also revealed that nonlawyers in the four agencies examined appear at all levels of agency proceedings, both adversarial and nonadversarial, and were reported to perform at each of these levels the identical functions that lawyers perform.[30] (Although there was no statistical data available, it was reported that nonlawyers sometimes, but not always, withdraw in favor of lawyers in some representational proceedings, such as deportation cases and tax cases involving charges of criminal fraud, even though agency rules do not require withdrawal.)[31] Although the mass justice agencies examined do not maintain statistical data on categories of representatives at all levels of agency process, there was uniform agreement by government officials interviewed that by far the greatest volume of nonlawyer assistance takes place at the very early stages. Much of this assistance takes place before a claim or application is filed with an agency.

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[28] Statistical data on representation in the Veterans Administration was part of the record and cited in the Supreme Court's opinion in Walters v. National Association of Radiation Survivors, 105 S.Ct. 3180, 3184 (1985).

[29] As of January 31, 1983, there were 28,077 enrolled agents on the roster of the Internal Revenue Service. In addition, certified public accountants (of whom there are some 200,000 belonging to the American Institute of Certified Public Accountants) are entitled to appear before the IRS. Also an unknown number of persons working for tax preparation services such as H.R. Block and Sears Roebuck regularly appear before the Service in connection with returns they have prepared. (H.R. Block maintains 7,672 offices in nearly every town and city in the country, according to a Business Week report dated June 17, 1985, (p. 89).) The IRS data is largely obtained from Professor Rose's study, note 1, supra at 51-54. It was confirmed by interviews with the Internal Revenue Service and by results of the survey conducted by the American Bar Association, note 25, supra (and set forth in Appendix A).

[30] Similar findings of performance of identical functions in non-mass justice agency proceedings such as those performed in the patent office were made in the Rose study, note 1, supra, at 51.

[31] Rose, id. at 53; INS interview with Sanchez, note 27, supra.

Nonprofit agencies specializing in assisting low-income persons with social security claims or immigration problems also stated in interviews that the great majority of their work involved the early non-adjudicative stages of agency practice - that is, assisting persons with preparation of applications and other forms, gathering of supporting materials, explaining to them agency rules and procedures, and sometimes accompanying them to initial interviews and conferences.[32] For example, AYUDA, a legal aid organization in the District of Columbia serving a largely Hispanic population, estimated that 80% of the agency's immigration caseload of some 2,000 cases involved providing assistance with routine applications for adjustment of status (primarily because of a relationship to a U.S. citizen) and other relatively non-complex matters such as applications for citizenship or extensions of stay. The agency reported further that this work was currently performed primarily by the agency's nonlawyer staff.[33]

Similarly, the Legal Counsel for the Elderly Program, a federally funded legal assistance program specializing in social security and other matters affecting elderly persons, reported that it relies primarily on nonlawyers to visit nursing homes and hospitals, and to assist elderly and disabled clients in filling out application forms for social security and other welfare benefits. The lawyer director of the program stated that it was his experience that the agency's nonlawyers did a better job than law students (whose work he sometimes reviewed) because the law students were either less well-trained or less inclined to spend long hours going over medical records, interviewing doctors, co-workers and employers to establish medical disability, and pulling together other essential facts needed to fill out forms properly. He also noted that nonlawyers are generally better trained, more skillful, and more patient than lawyers, in interviewing those clients who are ill, confused, illiterate or handicapped.[34]

That there are literally hundreds of thousands of low-level tasks of a non-adjudicative nature in administrative practice is, of course, well-known. In 1969 Justice Douglas stated the rationale for permitting nonlawyer assistance at these levels:

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[32] See note 2, supra, for a list of non-profit agencies interviewed.

[33] Interview with Yvonne Vega, Executive Director of AYUDA, in Washington, D.C. AYUDA has "recognized" status under INS regulations, and the Outreach Program of INS has described AYUDA as having "a highly qualified staff" which "has an outstanding reputation for relying on the law to assist clients." Letter dated March 29, 1985 from the acting director of the Outreach Program of INS, Yolanda Sanchez, on file with the District of Columbia Bar Foundation.

[34] Interview with Michael Schuster, Legal Counsel for the Elderly, in Washington, D.C.

> [I]t is becoming abundantly clear that more and more of the effort in ferreting out the basis of claims and the agencies responsible for them and in preparing the almost endless paperwork for their prosecution is work for laymen. There are not enough lawyers to manage or supervise all of these affairs; and much of the basic work done requires no special legal talent.[35]

More recently, Justice Rehnquist expressed similar views in the Court's plurality opinion upholding nonlawyer assistance to veterans in disability benefit proceedings under a statutory fee limitation of $10 that had the practical effect of discouraging legal counsel for fees. Walters v. National Ass'n of Radiation Survivors, 105 S. Ct. 3180, 3194 (1985).[36] Justice Rehnquist added with regard to the issue of innate skills of lawyers and nonlawyers that it was "less than crystal clear why lawyers must be available to identify errors in medical judgement." (Id., emphasis by the Court.)

Some of the early stages of administrative proceeding involve informal conferences or interviews, at which time many claims and disputes are resolved. These proceedings were deliberately designed to be informal in order to facilitate easy access to the agency by nonlawyers. Even in adjudications, formal rules of evidence and procedure are largely inapplicable.[37] In addition, many of the issues resolved by mass justice agencies are commonly thought of either as "non-complex" or "largely factual" and, therefore, matters that neither require lawyers to present them nor lawyers to adjudicate them. (Internal Revenue Service and Veterans Administration appeals are sometimes said to be in this category.)[38]

Of course, the questions of what is a "complex" matter or a matter "fraught with legal ramifications" are not easily answered, and they have been a matter of ongoing debate between lawyers and nonlawyers for many decades. It is not the purpose of this paper to resolve this sometimes metaphysical debate. It will suffice to observe what is apparent: that there are many non-trial type functions in non-courtroom settings which today can be, and are, performed competently by lawyers and nonlawyers alike, and this is so notwithstanding the fact that legal consequences affecting rights and obligations of parties may flow from the performance of any one of them. Indeed, casebooks are replete with judicial decisions allowing nonlawyers to undertake a variety of activities (such as real estate settlements, creation of trusts, and tax return preparation) even though these same activities are also performed by lawyers - even specialized in by some lawyers - and have legal consequences.[39]

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[35] Johnson v. Avery, 393 U.S. 487, 151 (1969) (concurring op.)(The Court held that in the absence of lawyers, the state could not validly bar nonlawyers -in this instance, prison inmates - from furnishing legal assistance.)

[36] See note 54 for a discussion of Walters.

[37] Gellhorn, Qualifications for Practice Before Boards and Commissions, 15 U.Cin.L.Rev. 196, 200-202 (1941).

[38] Walters v. National Association of Radiation Survivors, supra (plurality of opinion of Justice Rehnquist at 3194 with respect to veterans appeals); Rose, note 1 supra, at 27 et. seq.; Morgan, The Evolving Concept of Professional Responsibility, 90 Harv.L.Rev. 702 (1977); Comment, Representation of Clients Before Administrative Agencies: Authorized or Unauthorized Practice of Law?, 15 Valparaiso L.Rev. 567 (1981).

Interviews with mass justice agency personnel revealed a high level of satisfaction with nonlawyer representatives, not only at the early stages of assisting with forms and informal conferences, but also at later stages of agency proceedings. Similar findings of agency satisfaction with nonlawyer performance in administrative proceedings generally were made in the American Bar Association Committee survey set forth in Appendix A to this paper, and by Professor Rose in his study for the Administrative Conference.[40] The overwhelming majority opinion is that there is little perceived difference in the quality of help between lawyers as a class and nonlawyers as a class.[41] Viewpoints on competence and quality of work are, of course, necessarily subjective. However, investigation reveals that agency staff perceptions (that nonlawyers as a class perform as competently as lawyers as a class at virtually all stages of administrative agency proceeding) are supported by the agencies' statistical data.

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[39] Conversely, courts have also found at various times that the identical activities constitute the practice of law and can be performed only by lawyers. See discussion in the text at notes 81-84. In barring nonlawyers from practice before state administrative agencies, state courts have tended to over-emphasize the extent of the legal skills and training required without considering the objectives of the administrative agency and the informal nature of its proceedings. This thesis emerges from a study of state unauthorized practice decisions concerning practice before state administrative agencies. See Comment, Valparaiso L.Rev., supra, note 38, at 590.

[40] Rose, note 1, supra. at 54, 92.

[41] The ABA survey, note 25, supra, discloses that most agencies reported that nonlawyers did not pose any special practice problems, and that of those voicing complaints, nearly all said that the problem encountered most frequently was nonlawyer unfamiliarity with procedural rules and tactics. (It appears that responses to the ABA survey may not have been limited to nonlawyer representatives but may also have included complaints about nonlawyer claimants appearing pro se.)

For example, Social Security Administration data for 1983 shows that nonlawyers made a significant difference when they represented claimants in hearings. Claimants represented by nonlawyers were appreciably more likely to win their cases than they were if unrepresented. Moreover, representation by nonlawyers resulted in reversal rates after hearings that were almost as high as those achieved by lawyers. The 1983 data reveals that those who were unrepresented obtained reversals in only 43.7% of their cases. Representation by a nonlawyer increased the reversal rate to 54.5% as compared to a reversal rate in lawyer represented cases of 59%.[42] Thus, nonlawyers increased their clients' chances of reversal by 10.8% over those who were unrepresented, but persons represented by a lawyer were successful in only 4.5% more cases than persons represented by nonlawyers.

Similarly, the record in Walters v. National Association of Radiation Survivors, supra, at 3193, established that in disability review proceedings of the Veterans Administration, persons represented by nonlawyers were nearly as likely to prevail on appeal to the agency's Board of Veterans Appeals as those represented by lawyers. (The agency's statistics demonstrated that veterans represented by laypersons employed by non-profit service organizations such as the American Legion prevailed in approximately 16% of the appeals, and that veterans represented by privately retained lawyers and nonlawyer agents prevailed in 18% of the appeals.)[43]

Even in agencies where the subject matter can be technical or complex, there is empirical evidence to demonstrate that nonlawyers can provide effective assistance. The processing of patent claims before the

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[42] Participant Involvement in Request for Hearing Cases for Fiscal Year 1983, supra, note 3. See also Popkin, The Effect of Representation in Nonadversary Proceedings -- A Study of Three Disability Programs, 62 Cornell L.Rev. 989 (Aug. 1977). This in-depth study of three federal agency disability programs found that representation significantly increased chances of reversal of initial adverse agency rulings. The study did not focus its attention on the differences between attorney and nonattorney representation or the ensuing results. It did incidentally disclose, however, that in social security disability hearings, attorneys were no more likely than nonlawyers to request new hearings (although the author's sampling suggested that they were more likely to present new evidence).

[43] Several non-profit agencies and the District of Columbia Bar provide intensive training courses and materials for nonlawyers in disability benefits law and in immigration matters. Interviews with the training directors for those programs elicited the universal estimate that the success rates of their intensively trained nonlawyers were very high. Interviews with Schuster, note 32, supra. Vega, note 31, supra, and Leslie Long O'Leary of the District of Columbia Bar. It should be noted that the success rates of nonlawyer employees of nonprofit organizations are no doubt enhanced by training programs and also (when it is provided) by supervision and assistance by staff lawyers.

Patent Office, for example, is not within the technical expertise of most persons - lawyers or nonlawyers. As the Supreme Court observed in Sperry v. Florida ex rel Florida Bar, 373 U.S. 379 (1962) "(d)rafting of the specifications and claims of the patent application...this Court long ago noted 'constitute[s] one of the most difficult legal instruments to draw with accuracy,' Topliff v. Topliff, 145 U.S. 157, 171." The Sperry Court went on to note:

> And upon rejection of the application, the practitioner may also assist in the preparation of amendments...which frequently requires written argument to establish the patentability of the claimed invention under the applicable rules of law and in light of the prior art.

Notwithstanding the legal difficulties alluded to by the Court, the Court unanimously concluded that the activities involved in patent law practice could be performed by nonlawyers as well as lawyers. Moreover, the Patent Office has consistently reported a high degree of satisfaction with the quality of representation provided by nonlawyer patent agents.[44] Other federal agencies also allow nonlawyer representation, notwithstanding the fact that the subject matter of the representation requires considerable technical legal expertise. (Examples include the Internal Revenue Service and the Interstate Commerce Commission.)[45]

A number of the non-profit agencies interviewed for this report stressed that their nonlawyer employees and volunteers were specially and intensively trained to fill out administrative agency forms and to answer questions concerning agency rules and procedure.[46] They opined that it was their experience that lawyers had rarely, if ever, received any training in these functions as part of their law school curricula. Others noted that it was their experience that nonlawyers could be trained to perform well virtually all functions in administrative agency proceedings, including representation in adversarial hearings, and that a part of this training stresses the need to compile an adequate record for any eventual judicial review.[47]

Commentators have undertaken to analyze the various skills commonly thought of as "lawyers' skills" (including skills such as negotiating techniques, analytic abilities, powers of written and oral communication, reasoning, and judgment) and concluded that some or all of these skills are also possessed by many nonlawyer professionals.[48] This study has not attempted to parse finely here the particular skills involved in each stage of each mass justice agency proceeding. However, one common theme that was recurrently heard in interviews and confirmed by observations of mass justice agency proceedings was that those professionals (lawyers and nonlawyers) who are trained and experienced in particular functions do them relatively well and vice-versa. Conversely, having a law degree (or other degree) was no guarantee of proficiency in all administrative agency functions. This appears to be as true at the most advanced representational functions in agency proceedings as it is often recognized is true in courtroom proceedings.[49]

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[44] Sperry v. Florida ex rel Florida Bar, supra, at 402.

[45] See 31 CFR 10.3-.8 (IRS) and 49 CFR 1100.9 (ICC).

[46] See note 43 supra.

[47] See Statsy, Paralegal Advocacy Before Administrative Agencies: A Training Format, 4 Toledo L.Rev. 439 (1973). But see note ... supra.

In preparing this report, it was useful to examine for comparison purposes the proceedings of the Internal Revenue Service. It was found that nonlawyers regularly assist taxpayers at the earliest stages of simple tax return preparation all the way through the various levels of the Service, including audits and appeals. In addition, a nonlawyer may, by an examination procedure, become qualified to practice even before the U.S. Tax Court.[50] While only lawyers, certified public accountants, and those who pass examinations ordinarily provide representation at the highest levels of agency proceedings, nonlawyers who are not in any of these categories are also entitled to appear and assist taxpayers in connection with tax returns that they prepare.[51]

While some of the nonlawyers providing assistance are highly skilled and trained in tax law, including certified public accountants, others - for example, those persons who receive minimal training and work for high volume clinics such as those operated by H.R. Block, or who conduct their own individual tax services - may be distinctly less so and frequently do not have bookkeeping, accounting or legal experience. Internal Revenue Service officials who were interviewed reported that the Service does not maintain statistical data on comparative success rates by lawyers and nonlawyers but they expressed views similar to those interviewed at the Social Security Administration and INS: that there is little discernible difference in effectiveness between lawyers and nonlawyers as groups. Rather, the differences lie in the relative intelligence and skills of the particular individual.

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[48] See Morgan, note 22 supra; Rhode, note 81 infra.

[49] Chief Justice Burger, in a famous Fordham University speech, stated his opinion that one third to one half of the lawyers who appear in serious cases before the courts are not really qualified to render fully adequate representation. Burger, The Special Skills of Advocacy, 42 Fordham L.Rev. 227, 234 (1973). Also see Bazelon, The Defective Assistance of Counsel, 42 U.Cin.L.Rev. 1 (1973). Criticism of deficiencies in trial representation led to the appointment of a Committee to Consider Standards to Practice in the Federal Courts (chaired by Chief Judge Devitt of Minnesota) and fourteen federal courts engaged in a resulting pilot proposal requiring examination, minimum trial experience, and peer review. See Winter, Federal Courts Implement Devitt Proposals, 67 ABA J. 550 (1981).

[50] See note 27, supra; 31 CFR 10.3-.8.

[51] One may become an enrolled agent by passing a rigorous examination. This enables the person enrolled to advertise to the public that he or she is an enrolled agent and to provide representation in any matters. This procedure, however, does not preclude others who are not lawyers, CPAs, or enrolled agents from providing the same services in connection with their own clients whose tax returns they have prepared.

It is important to note that agency officials interviewed for this study did not suggest that a lawyer might never be able to perform any representational functions "better" than a nonlawyer. It was further recognized that even the preparation of a simple tax return, an application for disability benefits or a petition for adjustment of non-resident status can be fraught with peril for the client if poorly done and not corrected. The importance in many proceedings of establishing a record for possible future judicial review was also acknowledged. Nonetheless, agency personnel stressed that in their experience there was no guarantee that any given lawyer would necessarily provide better representation than any given nonlawyer.

Thus, it would appear that the relevant inquiry is not whether a particular lawyer can provide better representation in a given matter than a nonlawyer, or might have a slightly higher statistical chance of obtaining reversal or administrative review, but whether all lawyers as a class perform better than the class of nonlawyers. The statistical data concerning success rates in mass justice agencies and the subjective data elicited in interviews suggest that the answer to the latter question is negative.

Moreover, this author suggests that the most important question in mass justice agencies is not whether a given lawyer will or will not do a better job of representation at every stage of the proceeding than a nonlawyer, or will build a better record for judicial review, but whether sufficient numbers of proficient lawyers are able and willing to provide the assistance that is needed and desired by large numbers of ordinary citizens with their everyday, not very remunerative, claims and disputes before the agencies, and to provide that assistance for fees that the individuals can afford. The evidence discussed in Part II above compels the conclusion that they are not available to meet the needs.

As we shall see in the succeeding sections of this report, the Administrative Procedure Act (as well as several statutes governing specific agencies) empower federal administrative agencies to authorize lay representation in proceedings before them. However, mass justice agencies fail to do as much as they might under these statutes to encourage that representation. In addition, although federal statutes (and some agency regulations) provide a measure of protection to lay representatives against prosecution under state unauthorized practice laws, that protection needs to be strengthened if significant numbers of additional nonlawyers are to be encouraged to provide assistance, particularly assistance in the open market to moderate income persons who can afford to pay modest fees.

IV. Federal Mass Justice Agencies Have Authority to Authorize Nonlawyer Assistance in Administrative Proceedings

Representation by nonlawyers in formal federal agency proceedings, as well as nonlawyers giving advice and assistance with forms prior to formal appearance is not a novel concept. Indeed, from the earliest days of federal agencies, nonlawyers have provided representation - even in trial type adjudications in many agencies.[52] In fact, nonlawyer practice at all levels of agency action has been the norm from the inception of the Patent Office, the Internal Revenue Service and the Interstate Commerce Commission, among others.[53]

One of the earliest provisions for nonlawyer representation involved veterans benefits. In 1862, Congress provided that both lawyers and nonlawyer agents could assist Civil War veterans seeking disability benefits, a provision that has been extended to cover other war veterans and has continued to this day.[54]

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[52] For contrasting views as to the merits of this historical development, see generally Von Baur, The Practice of Non-lawyers Before Administrative Agencies, 15 Fed. B.J. 99, 113-115 (1955) and Gellhorn, Qualifications for Practice Before Boards and Commissions, 15 U.Cin. L.Rev. 196 (1941).

[53] The Patent Office's first admission requirements were issued in 1869 and provided that "any person of intelligence and good moral character may appear as the attorney in fact or agent of an applicant...." Rules and Directions for Proceedings in the Patent Office, Sec. 127 (Aug. 1, 1869). Although there were many efforts between 1898 and 1938 to limit Patent Office practice to lawyers, Congress steadfastly refused to bar nonlawyers. A more complete discussion of the legislative history on this point is contained in Sperry v. Florida ex rel Florida Bar, supra at 388-396. See also Hull v. United States, 390 F.2d 462, 464-465 (D.C. Cir. 1968) for a discussion of efforts after 1938 to limit nonlawyer practice in the patent office.

[54] Act of July 14, 1862, 12 Stat. 568, amended by Act of July 4, 1864, 13 Stat. 389. It is an interesting footnote to federal agency history that the original 1862 Veterans Disability Benefits statute reflected outright antipathy to lawyers. That Act set a $5 fee cap (changed two years later to $10) for providing assistance to Civil War Veterans seeking disability benefits. The $10 fee cap is still in effect. It is generally acknowledged that even though the fee limitation is applied to both lawyers and nonlawyers, "the limitation was designed to protect the veteran from extortion or improvident bargains with unscrupulous lawyers." Walters v.

For some agencies, there is explicit legislative authority for nonlawyer practice.[55] In other agencies, nonlawyer practice has simply evolved without express statutory authority. There has been some judicial recognition of the notion that an agency's authority to govern practice before it may be implied from its general powers to prescribe its rules of procedure irrespective of specific legislative authority to regulate practice.[56] In any event, it is well accepted that Congress has authority to empower federal agencies to issue rules governing practice before them, and courts have not attempted to interfere with that legislative authority.[57]

National Association of Radiation Survivors, *supra*, Note 5 at 3210 (*dissenting* op. Justice Stevens) and see historical references cited therein at 3210, note 5. Justice Stevens presents a persuasive argument that the fee limitation provision was not originally intended to exclude *all* lawyer representation (which is its near effect today as a practical matter). He notes that a $10 fee in 1864 is equivalent to $580 today and that it is more likely that Congress intended to impose that amount as a reasonable fee cap than to exclude lawyers from representation of veterans altogether. (*Id.*) In any event, the practical effect of the fee cap is to limit all representation for fee - from both lawyers and nonlawyers.

The majority in *Walters* upheld the $10 fee limitation against a challenge that it unconstitutionally precluded representation by lawyers. The majority found that the record did not show that veterans were harmed by nonlawyer representation. Justice Stevens dissented and argued that whether or not lawyers would be more successful in veterans proceedings than nonlawyers, the fee limitation limits the free choice of representative and that limitation is both harmful and an unconstitutional infringement of individual liberty.

[55] For example the Patent Act, 35 U.S.C. 31 expressly authorizes the Patent Office to issue rules admitting lawyers and nonlawyers and the Attorney Practice Act, 5 U.S.C. 500 expressly entitles certified public accountants to practice as a matter of right before the Internal Revenue Service. In addition, the enabling statutes for some welfare programs expressly provide for representation by nonlawyers.

[56] See *Goldsmith v. United States Board of Tax Appeals*, 270 U.S. 117, 122 (1926); *Herman v. Dulles*, 205 F.2d 715 (D.C. Cir. 1953). In *Sperry v. Florida ex rel Florida Bar*, *supra*, the Supreme Court, in discussing Congressional ratification of prior agency practice, appears to acknowledge the implied authority of agencies to regulate practice before them. See discussion, *infra*, at text of note 60.

[57] Conversely, not all state courts have agreed that state legislatures have authority to empower state administrative agencies to permit lay representation. *See* Comment, 15 *Valparaiso Univ.L.Rev.*, *supra*, note 38.

The legislative history of the Administrative Procedure Act reveals that at the time of its enactment in 1946, Congress continued to believe that agency practice should not be limited solely to lawyers in spite of the fact that by then administrative agency decisions had proliferated and there were increased urgings by the organized bar to exclude nonlawyers.

The Chairman of the American Bar Association's Committee on administrative law had testified in 1945 before the House Judiciary Committee Hearings on proposed bills dealing with administrative procedure that:

> "(T)here is a great deal of protest from the committees on unauthorized practice of the law in various State, local and municipal bar associations who are just as vehement in saying that these measures fail to recognize that legal procedure must be confined to lawyers.[58]

In fact, the extent to which nonlawyers should be allowed to practice before federal administrative agencies was vigorously debated both in and out of Congress for more than a decade. As early as 1941, the Attorney General's Committee on Administrative Practices examined the need for various reforms in administrative agencies. Its report stated that "(e)specially among lawyers' organizations there has been manifest a sentiment in recent years that only members of the bar should be admitted to practice before administrative agencies. The Committee doubts that a sweeping interdiction of nonlawyer practitioners would be wise..."[59]

The debate over the role of nonlawyers in federal agency practice continued throughout the deliberations leading to the passage by Congress of the Administrative Procedure Act in 1946.[60] The final outcome, as stressed by the Supreme Court in its unanimous Sperry decision was that "(d)espite protests of the bar, Congress in enacting the Administrative Procedure Act refused to limit the right to practice before the administrative agencies to lawyers."[61] Rather, as the Court noted, Congress determined that it would continue in effect the then existing practice of allowing each agency to determine for itself whether, and under what conditions, nonlawyers would be admitted to the bar of the agency.[62] Accordingly, Congress provided in

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[58] Hearings before House Committee on the Judiciary on Federal Administrative Procedure, 79th Cong., 1st Sess. (Serial No. 19) 33-34, Legislative History of the Administrative Procedure Act, S.Doc. No. 248, 79th Cong., 2d Sess. 79-80.

[59] Attorney General's Committee on Administrative Procedure, Final Report 124 (1941) (quoted in Sperry v. Florida ex rel Florida Bar, supra, at 396).

A more recent example of the belief that agency practice should be restricted to lawyers occurred during comments to the proposed rules of the Immigration and Naturalization Service to revise its procedures concerning the accreditation of nonprofit agencies to assist persons in INS proceedings. The agency reported that the most severe adverse comments came from those who expressed the view that agency practice should be limited entirely to lawyers. Department of Justice Summary of Final Rule, Request for Recognition: Accreditation of Representatives, 49 Fed.Reg. (No. 214) 44085, Nov. 2, 1984. Final Rule published in 8 C.F.R. Pt. 292.2 (Dec. 3, 1984).

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[60] During house debates on the matter of lay representation, the following illustrative exchange occurred. (92 Cong.Rec. 2156; Legislative History of the Administrative Procedure Act, S.Doc. No. 248, 79th Cong., 2d Sess. 316-317):

> "Mr. Austin: [I] notice...in the section to which the Senator is referring, this language:
>
> 'Nothing herein shall be construed either to grant or to deny to any person who is not a lawyer the right to appear for or represent others before any agency or in any agency proceeding.'
>
> Is it not a fact that somewhere in the bill the distinguished Senator has reserved the right to a non-professional -- that is, a man who is not a lawyer -- to appear, if the agency having jurisdiction permits it? For example, take a case where a scientific expert would better represent before the Commission the interests involved than would a lawyer. The right to obtain that privilege is granted in the bill somewhere, it is not?
>
> Mr. McCarran: The Senator is correct; and in connection with that I wish to read from the Attorney General's comment, as follows:
>
> 'This subsection does not deal with, or in any way qualify, the present power of an agency to regulate practice at its bar.*** Control over this matter remains in the respective agencies."

[61] Sperry v. Florida ex rel Florida Bar, supra, at 388. A review of the legislative history of the Administrative Procedure Act provision dealing with nonlawyer representation is contained in Sperry at 396-399. Also see The Attorney General's Manual on the Administrative Procedure Act, particularly pp. 62, 65, discussed in the text at note 63, infra.

[62] Congress also determined at the time of enactment of the APA to continue to allow federal agencies to establish requirements for the admission of lawyers (even though bar groups had objected to this practice) and it defeated an amendment to the Administrative Procedure Act introduced on the floor of the House which would have abolished agency admission

Section 6(a) of the 1946 Act dealing with "ancillary matters" that agencies could, in their discretion, authorize nonlawyer representation. The current version of this provision is not substantively different from the original 6(a) and is now set forth in Section 555(b) of the Administrative Procedure Act, 5 U.S.C. 555(b) (1977). It provides as follows:

> A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative.

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requirements for lawyers. *See* *Attorney General's Manual*, *supra*, p. 65. Subsequently, many agencies discontinued the practice of imposing admission requirements on licensed attorneys, and in 1965 Congress enacted the Agency Practice Act. 5 U.S.C. 500, which admits attorneys as a matter of right to practice before all federal agencies with the exception of the Patent and Trademark Office. (Certified pubic accountants were also entitled to a right to practice before the Internal Revenue Service.)

In enacting the Agency Practice Act Congress also provided that agencies could continue to set admission requirements for nonlawyers and reaffirmed the earlier Congressional intention set forth in 5 U.S.C. 555(b) to give agencies discretionary authority over the question of nonlawyer admission. Thus, the Attorney Practice Act expressly provides that the statute "does not grant or deny to an individual [who is not a lawyer or a C.P.A.] the right to appear for or represent a person before an agency or in an agency proceeding." The agencies retain their authority under the Agency Practice Act to regulate the conduct and impose discipline on both attorneys and laypersons after their admission to practice. Sen. Comm. on the Judiciary, *Report to Accompany S. 1758*, S.Rep. No. 755, 89th Cong., 1st Sess (1965); House of Representatives Comm. on the Judiciary, *Report to Accompany S. 1758*, H.R. Rep. No. 1141, 89th Cong., 1st Sess (1965) *reprinted in* 1965 U.S. Code Cong. and Admr. News, 89th Cong., 1st Sess. at 4170.

Bar groups have objected to federal agency authority to discipline lawyers, but thus far agencies have retained this authority. A committee of the Administrative Conference of the United States stated in a report that "agencies ought to have authority to discipline attorneys to maintain the integrity of their own proceedings...." Administrative Conference Comm. on Government Processes, *Report Concerning Discipline of Attorneys Practicing Before Federal Agencies*, 1982 ACUS (Vol. II) 488 (1984). Also see Cox, *Regulation of Attorneys Practicing Before Federal Agencies*, Report to the Administrative Conference of the U.S., 34 Case Western Reserve L.Rev. 173 (1984). The Conference adopted a statement in 1982 that any problems concerning attorney discipline before federal agencies were not of such a magnitude as to require changing the statutory authorization or adoption of uniform federal standards. 1 C.F.R. 310.8.

* * *

> This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding.

The Attorney General's Manual on the Administrative Procedure Act, published in 1947, is the principal guide to the legislative intent of the APA. The Manual explains the legislative intent regarding Section 6(a) as follows:

> The phrase "or, if permitted by the agency, by other qualified representative" refers to the present practice of some agencies of permitting appearance or representation in certain matters by nonlawyers, such as accountants. The phrasing of this clause, together with the last sentence of the subsection, makes it clear that nothing in the first section was intended to change the existing powers of agencies in this respect.
>
> * * *
>
> The last sentence of section 6(a) provides that "Nothing herein shall be construed either to grant or to deny to any person who is not a lawyer the right to appear for or represent others before any agency or in any agency proceeding." The question of the extent to which nonlawyers should be permitted to practice before administrative agencies was deliberately left to the determination of the various agencies, as heretofore. House Hearings (1945) p. 34 (Sen. Doc. p. 80); H.R.Rep. p. 32 (Sen. Doc. p. 265).[63]

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[63] Although the Attorney General's Manual notes that the first sentence of Section 6(a) dealing with the right of a party to counsel "does not extend to persons who appear voluntarily," the provision as a whole is generally interpreted to authorize lay representation in all proceedings, including "voluntary" appearances to apply for government benefits or grants, if lay representation is permitted by the agency. This broad interpretation is in accord with the expressed legislative intent noted by the Attorney General not to change the then existing practice of nonlawyer representation in a wide range of agency proceedings, which included at the time "voluntary" patent applications and applications for veterans disability benefits.

Even in cases presenting the issue of whether a party is entitled to counsel, rather than the right of practice before the agency, the provision has often been broadly and liberally interpreted to require an agency to permit representation of choice in a broad range of administrative proceedings. See, for example, Coyle v. Gardner, 298 F.Supp. 609 (D.Hawaii

In accordance with the general authorization provided in Section 555(b) of the Administrative Procedure Act (and, in some cases, under the additional authority of specific statutes, such as those authorizing nonlawyer practice before the Internal Revenue Service and the Social Security Administration) the great majority of federal agencies today permit at least some degree of nonlawyer representation in both adversarial and nonadversarial proceedings.[64] As we shall see in the following section of this report, however, nonlawyer representation does not occur frequently as a matter of actual practice.

Some commentators have noted that one historical rationale for admitting nonlawyers to practice before agencies such as the Patent Office and the Internal Revenue Service was the belief that certain categories of nonlawyers had highly specialized skills and knowledge enabling them to provide especially competent representation, and indeed, were often more likely to have the requisite specialized knowledge than were lawyers.[65] Senator Austin's statement in the debates on the APA that sometimes "a scientific expert would better represent before the Commission the interests

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1969) (applicant for social security benefits entitled under this section to choice of counsel, his wife, at hearing before examiner). The Court in United States v. Smith, 87 F.Supp. 293 (D.C. conn. 1949) expressed the view that since the section

> "is intended to establish uniform standards of fairness for dealings of administrative bodies with the citizens, courts should prefer a broader interpretation where two interpretations are possible of this section, one of which would narrow, the other broaden, the categories of the citizens touched by the administrative process to which the protection is extended."

Conversely, the Immigration and Naturalization Service takes the position that in those proceedings where persons are not "compelled" to appear, they are not entitled as a matter of right to assistance of a nonlawyer and hearing officers may exercise discretion in deciding whether to admit a nonlawyer representative.

[64] See 1984 Survey of Nonlawyer Practice Before Federal Administrative Agencies, a survey by the standing Committee on Lawyers Responsibility for Client Protection and the American Bar Association Center for Professional Responsibility, a copy of which is attached to this report as Appendix A. A similar survey of agencies was conducted by Professor Jonathan Rose and included as an Appendix to his report to the Administrative Conference. See Note 1, supra.

[65] Rose, note 1, supra at 26, and notes cited therein.

involved than would a lawyer" reflect that sentiment.[66] This "highly specialized competence" explanation is not as apt, however, with respect to the early authorization for lay representation in mass justice agencies such as the Veterans Administration where specialized competence in helping veterans apply for disability benefits was not a factor in the statutory encouragement of nonlawyer assistance.

Another plausible explanation for the early admission of nonlawyers to federal agency practice is that bar groups did not at first vigorously resist the use of lay practitioners because large numbers of lawyers had not yet themselves developed specialized federal agency practices (and perhaps did not view representation before agencies as "lawyering").[67]

Still another explanation for the historical admission of nonlawyers is that many agency proceedings were viewed in their earliest days as offering essentially informal, non-legalistic and often nonadversarial processes where formal rules of evidence and procedure would be largely inapplicable.[68] Early evaluations of federal agency procedures as essentially informal non-legal processes have, of course, been substantially modified as many agency proceedings have in fact become considerably more complex, as the doctrine of property rights in governmental benefits has developed (see e.g., Goldberg v. Kelly, 397 U.S. 254 (1970)); as lawyers have become increasingly involved in federal agency practice and as that practice has spawned an ever increasing volume of judicial review. Notwithstanding these developments, the federal statutory framework has continued to accommodate nonlawyer representation - both through Section 555(b) of the Administrative Procedure Act and through other statutes authorizing lay representation before specific agencies.[69]

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[66] See note 60, supra. This view finds some support in the history of the earliest agencies. As early as 1915, the Commissioner of Patents wrote in his Annual Report:

> "Fundamentally, knowledge of the invention is more important than knowledge of the rules and is often possessed by men of a type of mind which does not acquire legal knowledge readily."

Commissioner of Patents, Annual Report xiv (1915), quoted in Sperry v. Florida ex rel Florida Bar, supra, at 392.

This view has also been expressed occasionally in court decisions. For example, in Auerbacher v. Wood, 53A.2d 800, 802 (N.J.Eq. 1947) aff'd 59 A.2d 813 (N.J.Eq. 1948), a case involving an industrial relations consultant's practice before the National Labor Relations Board, the court opined that factual knowledge of industry is often more important in labor relations than legal knowledge.

[67] Many commentators have been highly critical of the Bar's efforts during this century to limit administrative agency practice to lawyers and see in these efforts a bald attempt to establish a laywer's monopoly. See Rose, note 1 supra, at 2; Morgan, The Evolving Concept of Professional Responsibility, 90 Harv.L.Rev. 702 (1977); Comment: Unauthorized Practice of Law: Supreme Court Holds States Cannot Restrict Activities on Nonlawyer Patent Office Practitioner, 1964 Duke L.J. 190; Rhode, note 81, infra.

[68] See Gellhorn, Qualifications for Practice Before Boards and Commissions, 15 U.Cin.L.Rev. 196 (1941).

In mass justice agencies particularly, accommodation of nonlawyer representatives - at least at lower levels of agency decision-making - continues to make practical sense in light of the fact that many proceedings in those agencies are still fairly routine and informal. Even in proceedings where the issues are somewhat more complex, or are a mixture of fact and law, and even where the proceedings are adversarial, this study has determined (as discussed above in Part III) that nonlawyers can provide competent representation.

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[69] See note 55 supra.

V. Federal Law and Mass Justice Agency Regulations Do Not Maximize The Potential For Increased Nonlawyer Professional Assistance Because They Do Not Adequately Protect Nonlawyer Professionals From State Unauthorized Practice Laws

Despite Congressional authority to permit nonlawyer representation in administrative proceedings, agencies have not uniformly encouraged that representation, and there has been little guidance in the matter from either Congress or the Executive offices. As a result, even though most agencies permit nonlawyer representation as a matter of principle, in only a handful of agencies is nonlawyer assistance common as a matter of actual practice. This finding emerges from three sources: interviews and statistical data obtained in connection with this study; interviews and statistical data summarized in a 1984 study by the American Bar Association's Standing Committee on Lawyers' Responsibility for Client Protection and the American Bar Association Center for Professional Responsibility (hereinafter referred to as the American Bar Association Committee report); and interviews and statistical data obtained by Professor Jonathan Rose and set forth in his unpublished report to the Administrative Conference of the United States on April 9, 1984.[70] A copy of the American Bar Association report is attached to this paper as Appendix A.

The American Bar Association Committee received responses from 97% of the thirty-three federal agencies surveyed. Most of the agencies responding reported that they permit nonlawyer representation, at least in some circumstances, and they also reported that they permit nonlawyer representation in both adversarial and non-adversarial proceedings.[71] Nonetheless, the American Bar Association Committee found that while the great majority of agencies allow nonlawyer representation in principle, "most of them seem to encounter lay practice very infrequently."[72] Nonlawyer practitioners were reported to appear overall in only 5% of adjudications.[73] In general, mass justice agencies reported higher levels of nonlawyer representation than did other agencies.[74]

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[70] The American Bar Association Committee report was published in February, 1985. Professor Rose's study, note 1, supra, focused on nonlawyer representation in economic regulatory proceedings. It identified fourteen federal agencies which did not permit any nonlawyer representation.

[71] American Bar Association Client Protection Committee Report, supra, at 1.

[72] Id.

[73] Id.

[74] Id.

The findings of the American Bar Association Committee with respect to mass justice agencies are generally consistent with those of the Rose report, Note 1, supra and with those obtained in connection with this report. The findings for the agencies examined in this report can be summarized as follows:

Internal Revenue Service

As noted in Section III of this report, the Internal Revenue Service does not maintain statistics on the category of representatives in proceedings before it, but it reports that a very large number of nonlawyers are registered to practice before the agency, and that in fact nonlawyer representation is very common.[75]

The Veterans Administration

As also noted previously in this report, the statutory $10 fee cap on veterans' disability benefit claims has effectively deterred lawyers from providing representation in these matters. (This is the largest category of cases requiring assistance in the Veterans Administration.) The $10 fee cap also deters nonlawyers from providing representation for fees. The Veterans Administration reports that there is a long tradition of free assistance to veterans provided by military service organizations and other nonprofit agencies such as the American Red Cross, and that these organizations provide assistance in 86% of the disability claims cases.[76]

The Immigration and Naturalization Service

The Immigration and Naturalization Service does not maintain statistics on representation, but agency personnel report that while there is a substantial amount of assistance provided by nonlawyers, the nonlawyers are all employees of nonprofit agencies or relatives and friends appearing without fee on a one-time basis. It is widely estimated that large numbers of persons in INS proceedings are completely unrepresented.[77]

The Social Security Administration

The Social Security Administration permits nonlawyer representation in both adversarial and nonadversarial proceedings. Nonlawyer representatives are also entitled to receive fee awards. However, nonlawyer representation constituted only 11.2% of the representation in all social security requests for hearing matters in 1983. (Another 1.4% of the matters included nonlawyers appearing jointly with lawyers.) Lawyers provided representation in 50.5% of the matters, and claimants in approximately 38% of the matters were unrepresented.[78] Although the Social Security Administration does not maintain data on the employment status of nonlawyers, persons interviewed in connection with this study generally agreed that the overwhelming majority of nonlawyers were relatives and friends appearing without fee on a one-time basis or paralegals and other employees of nonprofit organizations.

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[75] See text at note 29, supra.

[76] See note 28, supra.

[77] See note 27, supra.

The principal reason for the low incidence of lay representation overall, and the virtual non-existence of lay representation for fee in mass justice agencies (with the exception of the Internal Revenue Service) is that many agencies have not issued clear regulations or adopted other measures to implement the authority of Section 555(b) of the Administrative Procedure Act and to encourage nonlawyer representation, particularly representation for fee.[79] Section 555(b) is not self-executing. The right of nonlawyers to practice before each agency must be determined by reference not only to Section 555(b) of the Administrative Procedure Act but also "by reference to the statute and regulations applicable to the particular agency." Sperry v. Florida ex rel Florida Bar, supra, at 397. While the APA authorizes agencies to allow nonlawyer representation (and, as we have seen, it was not the intention of Congress to discourage that representation), each agency ordinarily has the final decision on whether - and to what extent - nonlawyers will be permitted or encouraged to provide representation before it since few agencies are governed by statutes compelling or banning legal representation.[80]

Most importantly of all, if agency regulations and other agency measures do not unambiguously authorize laypersons to practice before the agency, including all activity leading up to and incidental to that representation, nonlawyers attempting to provide assistance may be in jeopardy of prosecution under state laws and court rules prohibiting unauthorized practice of law. Agency failure to provide protection against state unauthorized protection laws has been the single most chilling deterrent to the development of nonlawyer specialists to assist low and moderate income persons in the immigration and social security fields. This problem cannot be overstated. One cannot address the problem of inadequate numbers of lay assistants to help low and moderate income persons in mass justice agencies and ignore the very real problem of the adverse impact on lay representation of state unauthorized practice laws, and the equally real problem of fear of prosecution under those laws.

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[78] These statistics were prepared by the Social Security Administration's Office of Hearing Appeals, and published in May, 1984 in Participant Involvement in Request for Hearing Cases for Fiscal Year 1983. A copy of this report is attached to this paper as Appendix B.

[79] Implementation of the statute can include, in addition to the issuance of clear regulations, measures such as the establishment of registers, administration of examinations, imposition of experience criteria, imposition of fee award criteria, and licensing or certification procedures. A few agencies, including the Internal Revenue Service and the Patent Office, have adopted some of these others measures. The Immigration and Naturalization Services has imposed competence criteria but only for employees of nonprofit organizations. See discussion in text at notes 109-111, infra.

[80] There are a few instances in which a federal statute affects the scope of an agency's authority to govern practice before it. For example, the Attorney Practice Act, 5 U.S.C. 500, entitles CPAs to practice before the Internal Revenue Service (and lawyers to practice as a matter of right before all federal agencies except the Patent Office).

The longstanding conflict between state bar unauthorized practice committees and nonlawyer groups over what constitutes the "practice of law" is well-known and this paper will not dwell unduly on that subject. Suffice it to say that numerous nonlawyers and nonlawyer entities, including real estate brokers, collection agencies, banks, accountants, publishing houses, title companies, insurance companies, and social workers, among others, have all been subjected at one time or another, in one jurisdiction or another, to charges of unauthorized practice of law.[81] One knowledgeable observer has written that appearances before specialized administrative agencies are one of the "five or six major areas [which] continue to be the primary source of controversy."[82] A 1980 survey of state bar unauthorized practice enforcement committees revealed that lay representation before administrative agencies (state and federal) accounted for 5% of bar committee investigations in 1979 and for 10% of the reported judicial decisions between 1970 and 1980. (Only two decisions were reported in the decade between 1970 and 1980 recognizing a right to lay representation before administrative agencies.)[83]

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[81] Many articles have been written critically examining the volumes of state unauthorized practice decisions. See, for example, Rhode, Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions, 34 Stan. L. Rev. 1 (1981); Christensen, The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors - Or Even Good Sense? 1980 Am.B.Found. Research J. 159; Comment, 15 Valparaiso L.Rev., supra, note 38; Weckstein, Limitations on the Right to Counsel: The Unauthorized Practice of Law, 1978 Utah L.Rev. 649; Morgan, The Evolving Concept of Professional Responsibility, 90 Harv. L.Rev. 702 (1977); Johnstone, Unauthorized Practice Controversy, A Struggle Among Power Groups, 4 Kan.L.Rev. 1 (1955); See generally, J. Fischer & D. Lachman, Unauthorized Practice Handbook: A Compilation of Statutes, Cases and Commentary on the Unauthorized Practice of Law (1972).

[82] Morgan, id, at 708.

[83] Rhode, note 81, supra, at 78.

The struggle between lawyers and nonlawyers has been longstanding, and exceedingly difficult to resolve. In significant part, this is because of the inherent difficulties in arriving at a definition of what constitutes "the practice of law."[84] In order to reach an accommodation with some of the country's major non-legal entities, the American Bar Association in 1969 published a book of agreements between the Association and ten professional groups.[85] The preamble to the agreement with the Council of Certified Public Accountants testifies to the difficulty in separating the "practice of law" from other non-legal activities - in this particular case, tax accounting:

> In our complex society, the average citizen conducting a business is confronted with a myriad of governmental laws and regulations which cover every phase of human endeavor and raise intricate and perplexing problems. These are further complicated by the tax incidents attendant upon all business transactions. As a result, citizens in increasing numbers have sought the professional services of lawyers

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[84] The Stanford Survey of reported unauthorized practice decisions between 1970 and 1980 found that the reasoning in those cases was circular or conclusory or both. Id., at 97. Because of the extreme difficulty in arriving at a definition of the practice of law, some courts have simply to define the practice of law generally. This has often led to confusing and inconsistent results. Compare, for example, Clark v. Austin, 101 S.W.2d 977, 982 (1937) (layperson appearing before state public service commission was engaged in unauthorized practice) with Auerbacher v. Wood, 53 A.2d 800, 801 (N.J. Eq. 1947), aff'd. 59 A.2d 863, 864 (N.J. Eq. 194) (industrial relations consultant appearing before National Labor Relations Board was not practicing law but only using his legal knowledge incidentally to provide non-legal services.) For a discussion of these and other cases, see Rhode, Id., and Comment, 15 Valparaiso L. Rev., supra, note 38.

[85] The American Bar Association Statements of Principles with Respect to the Practice of Law Formulated by Representatives of the American Bar Association and Various Business and Professional Groups (1969). These statements of Principles were subsequently withdrawn because of antitrust concerns. See Rose, note 1 supra at ...; Interview with H. William Allen, Chairman of the American Bar Association's Committee on National Conference Groups. The Statements of Principles are discussed in Comment, Valparaiso Univ.L.Rev., supra, note 38.

It is interesting to note that, as a general matter, nonlawyers who are members of organizations with the wherewithal to contest unauthorized practice laws - e.g., banks and insurance companies - over the years have worked out accommodating arrangements with bar groups. Nonorganized individuals attempting to assist low and moderate income persons before state mass justice agencies have generally not fared as well. See, for example, cases discussed at note 88, infra, and see text at notes 88-89, infra.

> and certified public accounts...Frequently the legal and accounting phases are so interrelated and interdependent and overlapping that they are difficult to distinguish. Particularly is this true in the field of income taxation where questions of law and accounting have sometimes been inextricably intermingled.

The statement on unauthorized practice in Ethical Consideration 3-5 of the American Bar Association's Code of Professional Responsibility, which was adopted by most of the states after its promulgation in 1969, and is still in effect in many states, adds little to the definition of the practice of law. It states:

> It is neither necessary nor desirable to attempt the formulation of a single, specific definition of what constitutes the practice of law. Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer.

The Model Code's Disciplinary rule, D.R. 3-10(A) subjects a nonlawyer to disbarment or other discipline if the lawyer provides "aid to a nonlawyer in the unauthorized practice of law." The American Bar Association revised its Model Code and adopted new Model Rules of Professional Conduct on August 2, 1983. The new Model Rules drop the text of Ethical Consideration 3-5 and no longer attempt even a general definition of the practice of law. The new Model Rules continue, however, to subject lawyers to discipline if they "assist a person who is not a member of the bar in the performance of any activity that constitutes the unauthorized practice of law." (Model Rule 5.5).[86]

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[86] The new Model Rules also continue the old Model Code ban on a lawyer forming a partnership with a nonlawyer if any part of the partnership consists of "the practice of law." Compare Model Rule 5.4(b) and Disciplinary Rule 3-103(A) of the Model Code.

The "Legal Background" section to ABA Model Rule 5.5 reviews the exceptions "in which an unlicensed individual is permitted to engage in an activity that clearly constitutes the practice of law and would otherwise be prohibited if engaged in by an unlicensed individual. Examples of such activity include...activities authorized by federal law e.g., Sperry v. Florida...." The Legal Background section commentary notes that the excepted activity would not be considered the unauthorized practice of law and concludes: "Accordingly, the ABA Model Rules do not prohibit a lawyer from assisting an unlicensed individual in one of these authorized activities."

Unfortunately, the effectiveness of this statement is undercut by the fact that the ABA's introductory section on the scope of the Model Rules stresses that the Legal Background notes "have not been adopted, do not

Similarly, while the Model State Administrative Procedure Act permits lay representation, it does so only if the representation is not prohibited under state unauthorized practice laws. The Model Act does not attempt to define unauthorized practice, but, rather, leaves it to the various states to determine.[87] While many states do allow lay practice before state administrative agencies, a number do not.[88] A 1980 study focused on representation before particular kinds of state administrative agencies and surveyed all fifty states. With respect to Workers' Compensation Boards, the survey disclosed that only twenty of fifty Boards permitted lay representation. The same study found that except in California, every state court to consider the issue between 1970 and 1980 had denied nonlawyers the right to practice before Workers' Compensation Boards.[89]

Federal administrative agency practice has not been spared from state court litigation over the issue of what constitutes the practice of law and whether it extends to practice before federal agencies. Practice before the United States Patent Office and the Internal Revenue Service were among the

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constitute part of the Model Rules, and are not intended to affect the application or interpretation of the Rules...." Neither the relatively more authoritative "Comment" to the Rules, nor the Rules themselves, state that authorized federal agency practice is not the unauthorized practice of law.

85 See Model State Administrative Procedure Act, Sec. 4-203(b) and Comment (1981).

88 Compare *Florida Bar v. Moses*, 380 So.2d 412, 417 (1980) which permitted lay representation (contract negotiator for school board in public employees relations commission hearing) with *Chicago Bar Ass'n v. Goodman*, 366 Ill. 346, 8 N.E.2d 941, *cert. denied* 302 U.S. 728 (1937) which barred lay representation (before the state's industrial commission dealing with workmens' compensation issues.)

Some state courts have insisted that because control over the practice of law is inherently a function of the state's judicial branch, only the state's supreme court can authorize practice before state administrative agencies. See *e.g.*, *West Virginia State Bar v. Earley*, 109 S.E. 2d 420, 435 (W.Va. 1959) (statute authorizing state compensation commissioner to adopt rules of procedure did not authorize him to issue rules permitting nonlawyer practice.) A critical appraisal of this case and other similar state cases is set forth in Comment, *Valparaiso Univ. L. Rev.*, Note 38, *supra*.

89 Rhode, Note 81, *supra* at 78. (The study also found that only eleven of fifty public utility commissions permitted lay representation generally. Another twenty-two commissions permitted only corporate counsel or agents of participating utilities and other companies.)

early subjects of unauthorized practice litigation in state courts.[90] However, the unauthorized practice debate over representation in federal agencies has now subsided with respect to practice before several of the federal administrative agencies. This has happened where the agencies have issued clear regulations permitting lay representation, and as state courts have increasingly recognized the authority of the federal agencies to do so under the Administrative Procedure Act and Supreme Court preemption decisions.

The leading Supreme Court preemption decision in the area of nonlawyer practice before federal agencies is Sperry v. Florida ex rel Florida Bar, 373 U.S. 379 (1963). The Sperry case involved a 1952 federal statute, 35 U.S.C. 31, which provided generally that the Commissioner of Patents

> (m)ay prescribe regulations governing the recognition and conduct of agents, attorneys or other persons representing the applicants or other parties before the Patent Office....

Pursuant to this general statutory authority, the Commissioner issued regulations allowing an applicant for patent to be represented by an attorney or agent and also established two separate registers, one for attorneys and one for nonlawyer "agents."

The Florida Bar brought suit against a patent agent who maintained an office in Florida and held himself out to the public as available to prepare patent applications even though he was not a member of the Florida Bar.[91] (The record revealed that of the 73 patent practitioners in Florida at the time, 62 were not members of the Florida Bar.)[92] The record established that Mr. Sperry prepared legal documents, rendered opinions as to patentability, and filed applications in the U.S. Patent Office. The Florida Bar contended that these actions constituted the unauthorized practice of law. In a unanimous decision, the Supreme Court held that the state was preempted from interfering with the agent's practice, including that part of the practice in Florida which was incidental to the preparation and prosecution of patent applications before the Patent Office, because of the Court's longstanding interpretation of the Constitution's Supremacy Clause that state laws must yield when incompatible with lawful federal legislation.[93] The Supreme Court found that the Patent Commissioner's action in issuing regulations and establishing a register under the general authority of the federal statute constituted preemptive action by the federal government. Moreover, the Sperry opinion implies that even in the absence of a Congressional statute expressly authorizing nonlawyer practice, an agency has discretionary authority to permit that practice so long as it is not prohibited by Congress. The opinion does not expressly discuss the doctrine of implied authority or the inherent powers of agencies, but it does refer specifically to the historical practice of federal agencies to govern conduct of practitioners and the legislative history of the Administrative Procedure Act in which Congress evidenced its intention not to interfere with that longstanding practice.

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[90] See, e.g., Sperry v. Florida ex rel Florida Bar, supra (reversing the Florida supreme Court's finding of unauthorized practice against a nonlawyer patent agent; Ginsburg v. Kovrak, 139 A. 2d 889, appeal dismissed, 79 Pa. Sup. Ct. 95 (1958) and Petition of Kearney, 63 So. 2d 630 (Fla. 1953) (refusing to allow attorneys admitted to federal courts but not to state courts to practice "tax law"). For a discussion of state efforts to bar practice before federal agencies, see Rose, note 1, supra; Simonelli, State Regulation of a Federal License to Practice Law: Unauthorized Practice or Federal Supremacy, 31 Fed. Bar News & J. 128 (1984); Comment, Unauthorized Practice of Law: Supreme Court Holds States Cannot Restrict Activities of Nonlawyer Patent Office Practitioner, 1964 Duke L.J. 190.

[91] The patent agent had also advertised himself as a "patent attorney," but he had ceased to do so and the issue of whether he could call himself a patent attorney rather than patent agent was not before the Court. Subsequently, U.S. Patent Office rules have made it clear that nonlawyers may not advertise themselves to be attorneys.

The Supreme Court did not attempt in Sperry to delineate the outer limits of the federal government's authority to allow federal agency practice in the several states, noting in a footnote that it was not necessary to do so in the case before it.[94] Nonetheless, the Court made it quite clear in the text of its opinion that the federal authority could not be as narrowly circumscribed as the Florida Bar attempted and that there are some activities incidental to federal agency practice that are "inevitable." Thus, the Court stated that preparation and prosecution of patent applications:

> inevitably requires the practitioner to consider and advise his clients as to the patentability of inventions under the statutory criteria...as well as to consider the advisability of relying upon alternative forms of protection which may be available under state law. It also involves his participation in the drafting of the specifications and claims of the patent application...(one of the most difficult legal instruments to draw with accuracy)...And upon rejection of the application, the

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[92] Sperry v. Florida ex rel Florida Bar, supra at 401, note 44.

[93] The Sperry Court based its holding on the Supreme Court's former seminal supremacy clause ruling in Gibbons v. Ogden, 9 Wheat 1, 211.

[94] Id., at 402, note 47.

> practitioner may also assist in the preparation of amendments...which frequently requires written argument to establish the patentability of the claimed invention under the applicable rules of law and in light of the prior art." (Citations omitted) (Emphasis supplied)[95]

The Court found that these kinds of activities were inevitable in carrying out the federal practice even though under state law those same activities "constitute the practice of law" and "in the absence of federal legislation, [the state] could validly prohibit nonlawyers from engaging in this...practice."[96]

In the footnote commenting that the Court was not called upon to determine the ultimate limits of the federal authority, the Court also stated:

> We note, however, that a practitioner authorized to prepare patent applications must of course render opinions as to the patentability of the inventions brought to him, and that it is entirely reasonable for a practitioner to hold himself out as qualified to perform his specialized work, so long as he does not misrepresent the scope of his license. (Emphasis added.)[97]

Finally, the Court rejected the Florida Bar's contention that the federal authority extended only to activities performed on federal property or in the District of Columbia. The Court noted that "The bulk of practitioners are now scattered throughout the country" and that "As a practical matter, if practitioners were not so located, and thus could not so easily consult with the inventors with whom they deal, their effectiveness would often be considerably impaired."[98]

The Court's decision in Sperry does not give federal agency practitioners a license to practice law generally. (Patent agents are clearly not authorized to draw up wills and trust instruments, for example.) In fact, the Court expressly stated that the State "maintains control over the practice of law within its borders except to the limited extent necessary for the accomplishment of the federal objective."[99] The Court's overall decision, and the language of its opinion quoted above, make clear, however, that the "limited extent necessary for the accomplishment of federal objectives" cannot be too narrowly circumscribed by the state and "of course" and even "inevitably" encompasses reasonable advertising, advice, analysis of applicable federal laws (and of comparable alternative state laws), preparation of legal documents, and conduct of appeals, including written argument under the applicable laws.[100]

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[95] Sperry, id., at 383. The Florida Court's injunction had permanently enjoined Sperry from "rendering legal opinions, including opinions as to patentability...preparing, drafting and construing legal documents...holding himself out in this state, as qualified to prepare and prosecute applications for letters patent...."

[96] Id.

[97] Id. at 402, note 49.

[98] Sperry, supra at 389-90.

It is important to note that it was not Congressional enactment of the Patent Act that brought about the federal preemption decision in Sperry. Rather, it was the Patent Office's issuance of regulations and the establishment of a register under the general authority of that statute that constituted the preemptive action.[101] Similarly, Section 555(b) of the Administrative Procedure Act authorizing nonlawyer representation, the terms of which are not substantively dissimilar to the Patent Act provision at issue in Sperry, is not itself preemptive of state regulatory action but, rather, is dependent upon agency implementation.

In addition to the Patent Office, a number of other federal agencies have clearly acted to preempt. The Internal Revenue Service, the National Labor Relations Board, and the Interstate Commerce Commission were among the early examples of agencies which issued regulations, established rosters, and took other action to recognize lay practitioners.[102] In general, where the federal government has clearly provided for lay representation, state courts in recent years have increasingly allowed the representation under the federalism doctrine set forth in Sperry. In addition, where an agency has issued unambiguous regulations authorizing lay practice before it, the courts have taken a broadened view since Sperry of what activity is "incidental" to the federal agency representation.[103] Finally, as some federally endorsed lay activities - preparation of patent applications and tax returns, for example - have in recent decades become the livlihood of large numbers of laypersons (who have also developed political power), the courts and the state bars have relaxed their earlier hostility to the activities.[104]

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[99] Id. at 402.

[100] Some commentators have focused on the Sperry Court's phrase "limited extent necessary for the accomplishment of the federal objective" and concluded that the activities necessary to carry out the federal agency's objectives may themselves be "limited" by the state unless the federal agency expressly authorizes a broad range of activity. See, e.g., Rose, note 1 supra; Simonelli, note ... supra. This focus and conclusion is probably too narrow and stringent, however, since the Court's opinion as a whole makes it clear that so long as the federal agency practice itself is generally authorized by the agency, there is a broad range of protected activity which is inevitably necessary and incidental to carry out that practice. Moreover, the Sperry Court plainly authorized that range of activity even though it recognized that the same activity, absent the federal authorization, could under state law constitute the "practice of law." Notwithstanding this broadened reading of Sperry, it may well be prudent for federal agencies to spell out in some detail the extent of authorized activities in view of the continuing vigor of state unauthorized practice laws and the continuing concern of laypersons about prosecution under them. See discussion in the text at notes 107 et. seq., infra.

[101] The Patent Act provision at issue in Sperry, 35 U.S.C. 31 merely empowered the Patent Office, if it so chose, to issue regulations governing the admission and conduct of lay representatives before it. See text at note 91, supra.

It must be stressed, however, that where a federal agency has not clearly acted to preempt (by issuing clear regulations, etc.) state courts may continue to prohibit lay assistance to persons involved in the agency's proceedings. This is illustrated by the recent case of State Bar of Texas v. Cortez, 674 S.W. 2d 803 (1985).

Mr. and Mrs. Cortez advertised that they had thirty-five years of experience in immigration matters and offered to provide services to Hispanics seeking assistance before the Immigration and Naturalization Service. The record revealed that the most common activity of the Cortez's was the selection and completion of the I-130 Form (Petition to Classify Status of Alien Relative for Issuance of Immigrant Visa) by interviewing them and helping them fill out the form according to the instructions provided by INS.[105] They also completed several other forms less frequently required such as applications for citizenship. The Cortez's also assisted in gathering and storing supporting documentation and preparing the alien for his or her embassy interview. The Cortez's charged a fee for their services, usually $400. The Texas Supreme Court affirmed the decision of the trial court enjoining Mr. and Mrs. Cortez from continuing their business on the ground that their acts constituted the unauthorized practice of law since it required special legal skills to know which forms, if any, should be filed, and what information to impart to the INS that would enable the alien to obtain a visa but not be subject to deportation.[106]

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[102] An extensive list of federal agency regulations permitting lay practice and court decisions and articles concerning those regulations is set forth in Rose, note 1, supra.

[103] See Rose, note 1, supra.

[104] See text at note 90, supra.

[105] This is the form most commonly filled out by laypersons employed by nonprofit agencies assisting aliens. AYUDA, for example, reported that approximately 80% of its immigration caseload involved preparation of this and similar forms. See text at note 33, supra.

A similar case arose in 1984 in North Carolina involving a client of Public Citizen, a public interest law firm. The client, Frances Lane, was a former nonlawyer employee of the Immigration and Naturalization Service who wished to provide for modest fees services similar to those provided in the Cortez case (and currently provided by laypersons employed by nonprofit agencies throughout the country).

The State Bar's unauthorized practice committee threatened to prosecute her for unauthorized practice of law if she did so.[107] Subsequently, following Ms. Lane's retention of counsel, the state bar entered into a settlement agreement allowing her to conduct her immigration practice so long as her advertising deleted any reference to paralegal services or immigration law.[108]

It would not seem that filling out routine adjustment of status and citizenship forms for the Immigration and Naturalization Service should be any more subject to state unauthorized practice prosecution in Texas than is the preparation of patent applications in Florida which was upheld by the Supreme Court in Sperry.

Both Sperry and Cortez involved the following similar activities:

1. Preparation of papers for submission to a federal agency on the basis of an understanding of a discrete body of federal rules and how those rules applied to the facts presented by their respective clients.

2. Giving advice to their respective clients regarding the applicability of federal rules to their particular fact situations (the patentability of an invention in one case and the adjustment of status in another), both of which may involve advice as to which of several alternatives to follow.

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[106] Similar holdings that preparation of immigration forms requires legal training and skills were handed down by the Florida Supreme Court in The Florida Bar v. Moreno-Santana, 322 So. 2d 13 (1975) and in The Florida Bar v. Retweta-Cabrera, 322 So. 2d 28, 29 (1975).

[107] Comments of Alan Morrison, Executive Director of Public Citizen, at a meeting of the Committee on Regulation of the Administrative Conference of the United States, September 7, 1984, as reflected in the nonverbatim minutes of the meeting.

[108] Letter from Frances Lane to Public Citizen, July 9, 1984. Typically, investigations of unauthorized practice, and their resulting prosecutions or settlements, are unpublished. See note 113, infra.

3. Conduct of their activities in their own offices in the states where they lived, rather than in the District of Columbia or in any federal facility.

4. Imposition of fees for their services (the amounts of which were not characterized in either case as grossly excessive).

5. Advertisement of their availability to provide the services in question.

There was no question raised in either case of any special competence to perform the activities in question other than the charge by the state bar committees that they were not trained to be lawyers. (In the North Carolina case involving Francis Lane, it should be noted that Ms. Lane was formerly an employee in good standing of the Immigration and Naturalization Service.)

The principal reason for the different treatment of the lay practitioner in Cortez from that accorded the patent agent in Sperry is that the Immigration and Naturalization Service has not implemented its authority under Section 555(b) of the Administrative Procedure Act to authorize nonlawyers to provide assistance in routine immigration matters for fees. Under INS regulations, nonlawyers may provide repeat representation only if they are employed by nonprofit organizations and providing free services to indigents or other persons eligible for their assistance.[109] Fee paying cases are restricted to lawyers. (There is no limit on the fees that a lawyer may charge, and unlike fee awards in social security disability cases, the fees are not subject to agency approval).

In accordance with the Attorney Practice Act, 5 U.S.C. 500, any lawyer may be admitted to practice before the Immigration and Naturalization Service without application of any special examination or other competence criteria. Conversely, the INS imposes strict competence criteria and admission requirements on nonlawyers who are employed by nonprofit agencies providing free assistance (primarily to indigents).[110]

The current director of AYUDA, a nonprofit organization accredited by INS and recipient of commendations from INS for its outstanding INS work, (see note ... , supra.) reports that she received certification from the INS to provide lay representation in INS proceedings several years ago when she was employed as a member of AYUDA's staff. She reports that she was required to show employment by AYUDA, submit letters of recommendation and other evidence as to her knowledge of INS rules, experience with INS matters, and good character. She reports further that she was personally interviewed by an officer of the INS, that the agency itself was subject to a field investigation, and that, in addition, INS agents interviewed her neighbors and friends concerning her character. Notwithstanding this rather rigorous certification procedure, Ms. Vega reports that when she subsequently left the nonprofit agency for a period of time, she lost her certification because she was no longer employed by a nonprofit organization. Thus, she was not permitted to charge fees for her services in the open market. She then went to work for a lawyer specializing in immigration matters and performed work on his cases for which he charged clients the usual legal fees. Now that she has returned to AYUDA as its director she is once again eligible to be certified (although she has not yet applied for it).[111]

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[109] 8 C.F.R. 292.1 A nonlawyer is also permitted under INS regulations to appear on a one-time basis, without fee, on behalf of a relative, friend or other person with whom there is a personal relationship.

[110] Id. 292.2

Similarly, Frances Lane, the North Carolina layperson desiring to provide assistance in routine immigration matters for a modest $100 fee was an employee in good standing of the Immigration and Naturalization Service before her retirement. Notwithstanding her acknowledged experience and competence, she is not authorized to charge fees for her services under current INS regulations, and, as a result, is faced with prosecution under the law of many states if she attempts to do so.[112] The INS regulations contrast sharply with those of the Internal Revenue Service which automatically permits former nonlawyer IRS agents who have completed six years of IRS employment to provide representation before the Service at all levels.

From the perspective of would-be nonlawyer practitioners, the Cortez and Lane cases are not isolated incidents in a climate otherwise favorable to their practice before federal mass justice agencies. Quite to the contrary, interviews reveal that they appear to nonlawyers to be only the latest examples of a confusion in application of state unauthorized practice laws to federal agency practice at best, and an ongoing antagonism to nonlawyer practice at worst. In any event, nonlawyer professionals who were interviewed, perceived a less than clear interface between state unauthorized practice laws and federal policy concerning practice before federal administrative agencies.[113] Significantly, they did not perceive any clear signal from federal mass justice agencies that nonlawyer representation for a fee is encouraged. Conversely, interviewees pointed to what they saw as signals that nonlawyer representation is encouraged by the federal government only if it is to be made available free of charge to the very poorest who cannot afford fees.

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[111] Interview with Yvonne Vega, Executive Director of Ayuda, in Washington, D.C. Ms. Vega noted that while her personal interview focused on her good character, other lay employees of nonprofit agencies have been examined as to their knowledge of INS rules.

At the time Ms. Vega applied for certification, the certification procedure was handled from the outset by the various district offices of INS located throughout the country, although final approval was given by the Board of Immigration Appeals in Washington, D.C. In December, 1984, the BIA revised its procedures and provided that applicants for certification should apply directly to BIA. Certification is now largely granted on the basis of written documentation as to knowledge, experience and good character, although the district offices may still conduct an investigation as they deem appropriate. (District offices have 30 days in which to recommend approval of the application to the BIA.) 8 C.F.R. 292.2 (1984); Interviews with INS officials, Sanchez and Hurwitz, note 27, supra.

[112] See note 106, supra and accompanying text.

Interviewees noted, for example, that federally funded legal aid organizations are generally barred from taking a fee generating case, unless they first attempt to find legal assistance from the private bar and no lawyer in private practice can be found who is willing to handle the matter.[114] Interviewees noted that federally subsidized legal aid organizations are not required to ascertain the availability of nonlawyer practitioners.

Interviewees also noted that while listings of nonprofit organizations are sometimes maintained by mass justice agencies, these referral lists are often of use only to the very poorest claimants who are eligible for free services under the guidelines of the nonprofit organizations.

Interviewees point to the fact that INS regulations allow lay representation only when no fees are charged. They surmised that opposition to lay representation before INS has contributed to the agency's failure to allow lay representation for fees. (It will be recalled that in December, 1984, INS revised its rules relating to accreditation of nonprofit agencies and certification of laypersons working for those agencies. The INS summary to the final rules notes that it received a largely favorable public response to its proposed rules but "drew the most severe criticism" from those "who expressed the view that the growing complexity of immigration...law and procedure necessitated the elimination of nonattorneys in this area altogether."[115])

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[113] It is difficult to obtain detailed information concerning the extent to which nonlawyer professionals are required or pressured, directly or indirectly, to cease activities which state bars consider unauthorized practice. A survey of state bar unauthorized practice enforcement committees revealed that 80% of the 1,669 complaints processed by them nationwide during 1980 resulted in informal, unpublished agreements, and that nearly all of the five percent of their cases which terminated in judicial findings of unauthorized practice were unreported. Only three judicial decisions concerning unauthorized practice were published in the nation during all of 1979 and only three others in 1980. See Rhode, Note 81, supra.

[114] Interviews with Willie Cook, Executive Director Neighborhood Legal Services Program, and with Leslie Long O'Leary, Pro Bono Coordinator, District of Columbia Bar. Legal service programs are allowed to handle social security claims of eligible clients, however.

Nonlawyer professionals providing assistance in social security disability cases as employees of nonprofit organizations noted that while the Social Security Administration regulations permit nonlawyer representation, they do not unambiguously stress that nonlawyer representatives may hold themselves out in the states as social security agents and charge fees in the marketplace for their services. Moreover, they note, while the enabling legislation for Social Security benefit claims provides that attorney fees may be deducted by SSA from a claimant's award and paid directly by the agency to attorneys, there is no similar proviso for nonlawyer representatives.[116] This suggests to them that it was not contemplated that fee awards to nonlawyer practitioners would be routine or frequent.

In fact, it is remarkable that even the existence of financial incentives (that is, fee awards in social security disability cases) has not resulted in a large pool of nonlawyer practitioners for those cases. Social Security Administration personnel estimated that the overwhelming majority of lay practitioners in the 12% of hearing request matters handled solely by them were paralegals working for legal aid and other nonprofit organizations. At the same time, the availability of fee awards in disability cases has significantly contributed to a dramatice increase in lawyer representation from 36.8% in 1977 to 64.2% in 1983.[117]

Thus, notwithstanding the fact that lay representation is permitted by the Social Security Administration, and lay practitioners may even receive awards, there has not developed any visible, readily identifiable cadre of social security disability "representatives" or "agents." No descriptive word even exists in popular parlance to describe such persons akin to the description of Patent Agents who practice before the Patent Office or Enrolled Agents who practice before the Internal Revenue Service. There are no readily identifiable organizations of such persons either. The National Organization of Social Security Claimants Representatives (NOSSCR), the largest organization of persons providing representation in Social

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[115] Also see text at note 59, supra.

[116] See 42 U.S.C. 406(a) (1983); 20 C.F.R. 404.975(b) (1976). (Agency may help an attorney collect a fee by deducting up to 25% of a claimant's past due award.)

[117] See Appendix A and Appendix B. The growth of legal service programs to assist indigents has also helped to increase both lawyer and nonlawyer representation.

Security Administration proceedings, reports that approximately 400 of its 2,400 members are nonlawyers but that virtually all of them are paralegals employed by legal aid and other nonprofit organizations.[118] Although Social Security Administration personnel and staff of NOSSCR stated that they were aware of a handful of lay practitioners in the Social Security Field who were not employed by nonprofit organizations, they were not on any roster or referral list and thus their names and addresses could not be made available either to this author or to claimants seeking assistance. NOSSCR maintains a referral listing for persons needing assistance in Social Security matters, but it is unable to refer fee paying cases to anyone other than its lawyer members because it has no listing of lay practitioners.[119]

Similarly, there are no visible and well known neighborhood offices for social security representatives akin to the H.R. Block and Sears Roebuck offices in the tax practice field. There are neighborhood legal aid and social service agency offices visible in most communities, but their services, as noted earlier, are ordinarily available only to indigents, and these agencies report that they cannot meet even all of their needs.[120] A review of the fifty pages of lawyer advertising in the yellow pages of the District of Columbia telephone book revealed several thousand lawyers' names (under specialty headings such as "social security matters") but no listings of private lay practitioners for social security matters could be located. Names of lawyers can be obtained from bar association lawyer referral services, but there are no similar referral mechanisms for the working poor or moderate income groups who might desire to employ nonlawyers.

Nonlawyer professionals who were interviewed also noted that while training programs in social security disability law and other subjects of federal agency practice are offered to nonlawyers by bar associations, law schools and nonprofit organizations, as well as by the federal government, none of these organizations will assign or refer a client to them directly.[121] Rather, cases are assigned to lawyers or to supervising lawyers in nonprofit organizations. Organizations offering the training confirmed this practice and stated a principal reason for it was the need to protect the program against bar charges of unauthorized practice. For example, the District of Columbia Bar's public service office confirmed that even though federal law permits lay representation in social security matters, cases coming through the Bar's referral service are always referred to lawyers and never to nonlawyers. (They may, however, be referred to recent graduates of law schools whose only training in the subject area has been the same training program offered the nonlawyers.[122])

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[118] Interview with staff, National Organization of Social Security Claimants' Representatives.

[119] *Id*.

[120] See Note 13, *supra*.

[121] Several organizations offering training programs to laypersons in federal agency subjects such as social security and immigration law were surveyed for purposes of this report. They included: the District of Columbia Bar's public service office; the Legal Counsel for the Elderly Department of the American Association of Retired Persons; the Immigration and Naturalization Service's Voluntary Outreach Program; the George Washington University's Senior Paralegal Institute; Antioch Law School's Paralegal Institute; and the federally funded Neighborhood Legal Services Program.

Even nonprofit agencies surveyed which employ legal personnel as well as nonlawyers reported that all cases are assigned internally to supervising lawyers rather than to nonlawyer professionals on the staff. These organizations were visibly proud of their nonlawyer staff. Nearly all nonlawyer staff were reported to be college graduates and many had graduate degrees as well. They were reported to have come from a variety of skilled backgrounds and experiences (some of them having come to the nonprofit agencies upon retirement from their careers). Some were said to have had backgrounds and experience in social security or immigration law before coming to the nonprofit agencies. Notwithstanding these qualifications, staff directors uniformly stated that it was the policy of their organizations never to assign cases to nonlawyer professionals on the staff. Rather, cases were always assigned to supervising lawyers. Although a variety of organizational reasons were cited by the differing groups, including the desire of the lawyer directors in several of the organizations to ensure "quality control," a principal reason cited by every single organization was the need to protect its program against charges of unauthorized practice.[123]

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[122] Interviews with Leslie Long O'Leary and Ann Barker of the District of Columbia Bar's Public Service Office.

[123] The practice of the American Association for Retired Persons' Legal Counsel for the Elderly Department is instructive. That agency has received one of three grants from the Social Security Administration to conduct training programs in social security law for nonlawyer employees of nonprofit organizations throughout the country. The agency has developed extensive training manuals. One of the training manuals in the District of Columbia reviews the District's unauthorized practice laws. It notes that many federal agencies have granted laypersons the right to appear before federal administrative agencies in a representative capacity. The manual concludes, however, with a set off and boldface warning that "notwithstanding a paralegal's authority to represent a client....it is LCE policy that all paralegals must have their work supervised by a staff attorney...[in order to] ensure quality legal work and prevent any possible unauthorized practice of law." Training Materials: What Constitutes the Unauthorized Practice of Law in the District of Columbia? Legal Counsel for the Elderly Continuing Legal Education Seminar.

The directors of the nonprofit organizations reported that they devote an extensive portion of their training sessions and training materials to the subject of state unauthorized practice rules and the need of nonlawyers to comply with them. (They also pointed out the extreme difficulty of teaching nonlawyers how to draw the line between authorized and unauthorized practice when lawyers, courts, and drafters of model codes have been unable to do so. See discussion in text at notes 83-87 supra.)

Perhaps as a result of the emphasis on unauthorized practice in staff training, perhaps as a result of the long history of unauthorized practice battles in the states, or a combination of the two, interviews with nonlawyer professionals working for social service agencies in the fields of social security and immigration laws disclosed that not a single one of them would consider opening a private social security or immigration practice. The predominant reason given was fear of state bar unauthorized practice charges.[124]

In sum, even when mass justice agency rules allow nonlawyer practice, and even when it would appear that the authorized practice is probably protected against state unauthorized practice laws under the federal preemption doctrine, nonlawyer professionals are extremely skittish about getting into the "business" of agency representation (with the exception of the business of tax preparation where the practice has been well-established for decades and accepted by state bars). This seems to be due to the cumulative effect of past and ongoing organized bar opposition to nonlawyer practice before federal administrative agencies; the continuing ban on nonlawyer representation in many state administrative agencies; the conflicting decisions from state to state over what constitutes the unauthorized practice of law, including the conflicting and confusing state court decisions on whether practice before administration agencies constitutes unauthorized practice; the continuing state prosecution of some federal agency practice (illustrated by the Cortez case); the continuing prohibition in lawyer codes of ethics against assistance to laypersons engaged in unauthorized practice; the half-heartedness with which nonlawyers practice is encouraged by some federal agencies (exclusion of nonlawyer practice for fees, for example); and the continuing general antipathy of many state bars to nonlawyer legal practice generally. All of these past and ongoing factors have created an atmosphere of uncertainty, confusion and fear on the part of nonlawyer professionals who might otherwise be a source of assistance for the many persons now unrepresented in federal mass justice agency proceedings.

The results of this empirical study suggest that while the issuance of unambiguous regulations as contemplated by Section 555(b) of the Administrative Procedure Act is essential to establishing federal preemption, agency regulations alone may not be sufficient to allay the pervasive fears of the would-be lay practitioners. Agencies that wish to encourage increased nonlawyer assistance may have to do more than merely issue regulations; they may have to take such measures as certifying nonlawyer practitioners, creating rosters and referral lists, and announcing very clearly the incidental activity to be encompassed in the authorized nonlawyer professional practice.

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[124] Twenty-five nonlawyer professionals working for the social services agencies listed in note 2, supra were interviewed.

In addition, although it is likely that agencies have implied authority to admit nonlawyers to practice before them, and although it is probable that even if they do not have implied authority, Section 555(b) of the APA authorizes agencies to admit nonlawyers, it may be prudent and useful to amend the language of Section 555(b) itself to make it crystal clear that such agency action is authorized. Further, it may be helpful to amend Section 555(b) to make it unambiguously clear that those admitted to practice before federal agencies are authorized to do all that is incidental and necessary to that representation in their respective states, including advertisement of their availability, giving advice as to applicable federal rules, preparing relevant documents, and charging fees, keeping in mind that in its unanimous Sperry decision, the Supreme Court opined that these activities are an "inevitable" part of federal agency practice.[125]

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[125] See text at note 95 *supra*.

VI. Federal Mass Justice Agency Authorization for Increased Nonlawyer Professional Assistance Can Be Accomplished in a Manner that is Consistent with Agency Needs to Regulate Competence and Ethical Conduct of Practitioners

Federal agency rules and practice which, directly or indirectly, limit the supply of nonlawyer representatives are largely grounded in protective notions - that is, that some or all of the persons affected by the agency's proceedings will be subject to exploitation and harm by incompetent or unscrupulous persons acting as their representatives.[124] This survey found that there was uniform agreement, both within and without government, that there are indeed unscrupulous persons who take advantage of some mass justice agency participants, particularly the non-English speaking, the physically and mentally disabled, the uneducated, and other vulnerable persons. Interviewees had legions of "horror stories" about so-called "immigration experts" or "social security experts" who were completely without knowledge of INS or Social Security rules and who succeeded in obtaining wedding rings, lifetime savings, and other existing assets from vulnerable persons on the promise that they would get a "green card" or disability payments for life. One interviewee related a story about one so-called "social security expert" who would round up a whole van of elderly social security recipients on the day that their social security checks arrived in the mail and take them to his own bank for deposit of the checks into his own account.[125]

However, the "horror stories" were not by any means limited to nonlawyers. Complaints against unscrupulous lawyers were also frequently cited as a major problem, particularly complaints of fee gouging. A recent _Time_ magazine article highlighted the problem of exploitation of immigrants by both lawyers and nonlawyers. It noted that five lawyers had been convicted or sentenced in the past year on charges stemming from immigration violations and reported that "INS officials are among the critics [of lawyers]: they estimate that 30% of permanent resident petitions are fraudulent with corrupt or incompetent lawyers often to blame."[126] Conversely, INS officials interviewed could recall only two instances in the past two years in which nonlawyers who had been accredited by the agency had been the subjects of investigation for unethical conduct or incompetent representation.[127] (The agency does not maintain statistical data on numbers of complaints or numbers of persons disbarred from agency practice or otherwise disciplined.) Moreover, it is not apparent to this author that the existing ban on representation in INS proceedings by a former staff member (now director) of a nonprofit agency recognized by INS as having an "outstanding reputation for assisting clients within the law" or by a former INS employee who was in good standing in any way protects the public.[128]

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[124] Similarly, protective notions are usually relied on by state courts in upholding state unauthorized practice laws. For a critical analysis of these decisions, and the reasoning threin, see the artciles cited in note 79, _supra_.

[125] Interview with N. Schorr, note 116 _supra_.

[126] _Time_, July 8, 1985, p. 77.

[127] INS interviews, note 25, _supra_.

In sum, it would appear that while mass justice agencies are no doubt justified in enacting regulations to control the conduct of practitioners in order to prevent abuse of the public, there is no evidence that those regulations need to be significantly different with respect to nonlawyers than they are with respect to lawyers.

In this connection, it is noteworthy that the problem of protecting the public from unscrupulous lay practitioners is not a new one for federal agencies. Further, past history demonstrates that the remedy for the problem need not be disqualification of all nonlawyers. For example, the problem of unscrupulous nonlawyer patent agents at one time became a national scandal and led to several Patent Office reforms. As the Supreme Court noted in its Sperry decision:

> Despite the early recognition of nonlawyers by the Patent Office, these agents, not subject to the professional restraints of their lawyer brethren, were particularly responsible for the deceptive advertising and victimization of inventors which long plagued the Patent Office.[129]

What is instructive about the Patent Office experience is that even though the great bulk of complaints of misconduct involved nonlawyer patent agents, the Patent Office did not disqualify all lawyers as a group. Rather, it tailored reform in the form of good moral conduct requirements and patent examinations which could be complied with by both lawyers and nonlawyers. The Patent Office system has been widely lauded as a highly workable one, and one which has successfully rooted out incompetent and unscrupulous patent agents without broadly disqualifying a whole class of persons (that is, the class of nonlawyers). As the Sperry court noted:

> So successful have the efforts of the Patent Office been that the Office was able to inform the Hoover Commission that `there is no significant difference between lawyers and nonlawyers either with respect to their ability to handle the work or with respect to their ethical conduct.'[130]

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[128] See discussion at ntoes 105, 109, supra.

[129] Sperry v. Florida ex rel Florida Bar, supra, at 390.

[130] Id. at 402.

Moreover, the Patent Office has succeeded notwithstanding the fact that a patent application is, in the words of two Supreme Court decisions, "one of the most difficult legal instruments to draw with accuracy" and "frequently requires written argument...under the applicable rules of law."[131]

Similarly, other studies have disclosed that federal agencies which admit nonlawyers to practice have generally not found unethical conduct of nonlawyers to be a greater problem than that posed by unethical lawyers and have not found the problem of regulating nonlawyer conduct to be greater either. This was the conclusion of the American Bar Association Committee's survey of thirty-seven federal agencies, and it was the conclusion reached by Professor Rose on the basis of his interviews with federal agencies in the economic regulatory area.[132]

There are, of course, fundamental ethical requirements that agencies should impose on both lawyers and nonlawyers. Agencies are likely to have these already in place, at least for lawyers. Provisions barring conflicts of interest or criminal activity, for example, are near universal. Other provisions barring gross negligence, or fee gouging, may or may not be promulgated specifically by various agencies, but it would seem that where adopted, they should apply with equal force to lawyers and nonlawyers. These activities, and similar unethical conduct, are barred in the American Bar Association's model codes of lawyer conduct which have been adopted by nearly all federal agencies for the purpose of regulating the ethical conduct of lawyers practicing before them.

The issue of nonlawyer competence can be treated simply as an ethical matter (as it currently is in the ABA's model code provisions such as those barring negligence and assumption of tasks beyond one's capabilities without association of one who is more skilled). Or federal agencies can - and some of them do - employ a wide range of additional methods to ensure that nonlawyer practitioners meet agency standards of competence. The Patent Office's administration of an examination to potential patent agents was discussed above. A similar examination system is employed by the Internal Revenue Service although it is used only for certain categories of representatives. As noted earlier, the IRS system accomodates representation to a limited extent from minimally trained H. & R. Block type personnel who are not subject to examination as well as representation in all matters from former IRS agents, certified public accountants and lawyers who also are not subject to examination. (Lawyers and certified public accountants are presumed by virtue of their training to be qualified and are authorized under the Attorney Practice Act, 5 U.S.C. 500 to provide representation.) Finally, the IRS permits representation of the general public in all matters by nonlawyer "enrolled agents" who must pass stiff examinations and meet continuing legal education requirements.[133] Ethical restrictions against conflicts of interest, fraud, misrepresentation, and other malfeasance are enforced against both lawyers and nonlawyers through the Service's disciplinary machinery. The agency retains the ultimate authority to disbar or otherwise discipline both lawyers and nonlawyers.[134]

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[131] Id.

[132] See note 23, supra, and Rose, note 1, supra, at 58-69. For example, Professor Rose's interviews with Interstate Commerce Commission officials revealed that there had been no major disciplinary problems with nonlawyer practitioners in fifteen years. Only in the Internal Revenue Service were the total numbers of disciplined nonlawyers reported to be significantly large. The Office of Practice reported that it had imposed discipline against nonlawyers in approximately two-thirds of the 360 discipline cases arising in the five-year period between 1978 and 1983. Hwever, these numbers were not viewed by IRS officials with alarm in light of the extremely large numbers of nonlawyers authoriaed to practice before the IRS (see note 27, supra).

As is the case with the Internal Revenue Service, the Immigration and Naturalization service employs a multi-tiered approach to assuring competence among those representatives who do not charge fees.[135] (As noted earlier in this study, nonlawyers, no matter how competent or experienced, are not authorized under agency rules to provide representation if they charge fees.) Nonlawyer friends, clergy, and neighbors appearing on a one time basis without fee are not subject to any special competence or experience requirements. Nonprofit organizations assisting the general public, however, must be recognized by the Board of Immigration Appeals, and individual employees therof must be accredited before they are permitted to appear in representational capacities.[136] Partial accreditation of nonprofit organization employees who do not yet satisfy all the INS training and experience criteria enables those employees to assist individuals in filling out forms, but it does not allow them to appear as representatives in INS proceedings. To be fully accredited, an individual employee of a nonprofit organization must satisfy experience criteria as well as good moral conduct standards.[137]

Other agencies, such as the Social Security Administration, have historically not found it necessary to require nonlawyer representatives to pass examinations, complete continuing legal education courses, or satisfy past experience or other competence criteria.[138] SSA officials reported, however, that the agency is considering the adoption of stricter measures than now exist to protect the public, including a procedure by which agency claimants can complain to the agency about their representatives. Agency officials pointed out that there is a degree of control over competence of practitioners by virtue of the fact that attorney and agent fees must, by statute, be approved by the agency in social security disability proceedings and in some other benefits cases. (Data concerning fee awards to nonlawyers has not been collated by the agency.)

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[133] See note 49, supra.

[134] See note 132, supra.

[135] See notes 107 and 108, supra.

[136] The Veterans Administration also requires that nonprofit organizations desiring to provide representatoin to the general upblic in V.A. proceedings be recognized by the agency.

[137] See disucssion in text at note 109.

As the foregoing discussion indicates, federal agencies currently employ a variety of mechanisms to ensure competent representation by practitioners, and they are not necessarily the same in every agency. This study has concluded that there is no reason that competence criteria should be uniform throughout government since each agency has its own particular evils to prevent, differing skill needs to carry out the varied mandates of the agencies, as well as differing cost benefit and other administrative issues to consider. (It will be recalled that in enacting the Administrative Procedure Act, Congress considered and clearly determined to authorize federal agencies to continue their then existing practice of imposing varied practice criteria according to the particular needs of the respective agencies. This determination was reaffirmed in 1965 at the time of enactment of the Attorney Practice Act.)[139]

Finally, this study ascertained that enforcement of both competence standards and ethical conduct standards varies from agency to agency in the mass justice area as it does in other areas. The Office of Practice in the Internal Revenue Service, for example, has an active program of enforcement.[140] On the other hand, while the Social Security Administration maintains ethical standards and retains the authority to discipline and disbar lawyers and nonlawyers, in practice the authority is rarely used.[141] There have been numerous studies and articles on the subject of inconsistent federal disciplinary rules and the inconsistent - and sometimes lax - enforcement thereof. As one federal court wrote over thirty years ago, "probably no subject has received more continuing effort, so far without success, to accomplish by legislative enactment some uniformity and desirable standards of admission and disciplinary action than has this problem of practice before administrative agencies."[142] Although the issue of automatic admission of lawyers to practice before federal agencies has been resolved in the intervening years with the passage of the Attorney Practice Act, the issue of inconsistent enforcement of discipline remains. Notwithstanding repeated efforts by bar groups to remove lawyer discipline from agencies to state bar disciplinary entities, Congress has continued to allow federal agencies to exercise discretion in the matter of practitioner discipline for both lawyers and nonlawyers. The Administrative Conference of the United States considered the issue in 1982 and concluded that any problems concerning inconsistent attorney discipline before federal agencies were not of such a magnitude as to require changing the statutory authorization or adoption of uniform federal standards.[143]

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[138] Some regulatory agencies - for example the National Labor Relations Board - have also historically adopted a laissaz faire approach to pracititioner regurlation. See Rose, note 1, supra, and ABA Committee Survey, note 23, supra.

[139] See discussion in text at notes 60 and 61, supra.

[140] See note 132.

[141] See text and note 138.

It is not the purpose of this paper to revisit the long-lived controversy over federal agency enforcement of practice rules. Nor is it necessary to resolve the pros and cons of inconsistent discipline by federal agencies in order to address the discrete issue of whether mass justice agencies should be urged to admit more nonlawyers to practice in order to alleviate the problem of insufficient numbers of representatives for the overwhelming numbers of ordinary citizens having claims or disputes before those agencies. In view of the finding that disciplinary problems caused by nonlawyers in federal agency proceedings generally are not believed by agency officials to be significantly greater than those caused by lawyers, and in view of the finding that enforcement of good conduct rules against nonlawyers is a manageable task even when large numbers of nonlawyers are admitted to practice (as is the case in the Internal Revenue Service), this paper concludes that the potential need to discipline errant nonlawyers should not necessarily deter mass justice agencies from encouraging increased nonlawyer representation. This is not to say, however, that agencies should have no rules governing the ethical conduct of nonlawyers. To the contrary, in order to protect the public, agencies should make applicable to nonlawyers the existing rules dealing with lawyer malfeasance such as negligence, fee gouging, fraud, misrepresentation and representation when there is a conflict of interest. Moreover, agencies should ensure that effective procedures are established for adequate enforcement of those rules of practice, including procedures whereby the adversely affected public can complain about misconduct of those nonlawyers admitted to practice before the agencies.

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[142] Camp v. Herzog, 104 F.Supp. 134 (D.D.C. 1952). A more recent discussion of the problem appears in Best, Shortcomings of Administrative Agency Lawyer Discipline, 31 Emory L.J. 535 (1982).

[143] See note 60, *supra*.

Conclusion

This study has determined that a large number of individuals in mass justice agency proceedings are unrepresented and that a source of assistance that has not been fully tapped exists in the pool of skilled nonlawyer professionals. It appears that guidance to mass justice agencies on the subject of nonlawyer practice would be useful, and that it should encompass encouragement to the agencies to review their regulations and policies with the twin goals of increasing representation and maximizing the goal of free choice of representative whenever feasible.

This study has further ascertained that in some federal mass justice agencies, nonlawyer representation has not been particularly encouraged by agency rules and policies, and in some instances it has been discouraged. This has served to deter nonlawyer professionals from seeking to establish federal agency practices because they believe they will be subject to prosecution under state laws prohibiting the unauthorized practice of law. This study has concluded that because the state unauthorized practice of law problem is so pervasive, and because federal agency regulations must unambiguously preempt state laws to provide protection to nonlawyer practitioners, mass justice agencies should be urged to declare unambiguously their intention to preempt, both with respect to representation during agency proceedings and with respect to all activity incidental to that representation which may be performed in the states. In so doing, the agencies should, of course, consult and coordinate with states and other interested parties before adopting final regulations in accordance with the recommendations on preemption promulgated by the Administrative Conference in Recommendation 84-5 on December 6, 1984.

Mass justice agencies should further be encouraged to tailor their admission criteria narrowly so that particular issues of competence in agency proceedings are addressed without overly broad disqualification of the entire class of nonlawyers (or of nonlawyers who charge fees.) Given the evidence that skills vary more from individual to individual than from class of lawyers to class of nonlawyers, those agencies that desire to impose competence requirements should be encouraged to focus on the particular functions to be performed at varying levels of agency proceeding, and the particular skills, training and experience needed to perform competently those particular functions. (The Internal Revenue Service is a good model in this regard, as is the partial and full accreditation scheme of the Immigration and Naturalization Service for employees of nonprofit organizations.) In this connection, agencies should determine carefully and narrowly whether there are proceedings of a trial type nature that are so highly specialized that it is essential to mandate representation only by those who are trained trial lawyers and familiar with rules of evidence and hearings on a record leading to judicial review.

Finally, mass justice agencies should review their rules of practice that deal with attorney misconduct (such as negligence, fee gouging, fraud, misrepresentation and representation when there is a conflict of interest) to ensure that similar rules are made applicable to nonlawyers as appropriate and should ensure that effective agency procedures are established for adequate enforcement of those rules of practice, including procedures for receiving complaints from the adversely affected public.

RESULTS OF THE 1984 SURVEY OF NONLAWYER PRACTICE BEFORE FEDERAL ADMINISTRATIVE AGENCIES

STANDING COMMITTEE ON LAWYERS' RESPONSIBILITY FOR CLIENT PROTECTION AND
THE AMERICAN BAR ASSOCIATION CENTER FOR PROFESSIONAL RESPONSIBILITY

FEBRUARY, 1985

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REPORT ON 1984 SURVEY OF
NONLAWYER PRACTICE BEFORE
FEDERAL ADMINISTRATIVE AGENCIES

I. Background

The American Bar Association Standing Committee on Lawyers' Responsibility for Client Protection disseminated this survey to thirty-three (33) federal administrative agencies in late August, 1984. The survey was intended to provide background information on the experiences of agencies permitting nonlawyer practice (other than for purposes of self-representation) for LRCP's Colloquium on Nonlawyer Practice Before Federal Administrative Agencies held in November, 1984. During September and October ninety-seven percent (97%) of the agencies responded either over the phone or by mail following initial contact with their Offices of General Counsel. The ABA Center for Professional Responsibility tabulated the results in October, 1984. In December, 1984 all responding agencies were given an opportunity before publication to amend for accuracy a draft tabulation and analysis.

II. Brief Analysis and Conclusions

We found that the overwhelming majority of agencies studied permit nonlawyer representation in both adversarial and nonadversarial proceedings. However, most of them seem to encounter lay practice very infrequently (in less than 5% of adjudications), while only a few encounter lay practice as often as lawyer practice. Thus, although universally permitted, lay practice before federal agencies rarely occurs.

Few of the responding agencies comprehensively monitor or control the lay practice that does occur. Only about twenty percent (20%) require nonlawyers to register with the agency before permitting them to practice. Registration procedures may range from simply listing nonlawyers' names to more formalized certifying or licensing procedures which may include testing and character reviews. Proceedings in most of these agencies tend to require highly technical or specialized knowledge. Registration insures that lay representation meets an appropriate level of quality and competence. In at least one agency, registration insures that nonlawyer representatives will charge only nominal fees or no fees at all.

No agency indicated that they would discipline nonlawyers differently from lawyers, although they clearly have an additional ability to pursue sanctions against lawyers through external disciplinary mechanisms. Only a few agencies indicated any special need for nonlawyer discipline. Most reported they had not encountered any problems with misconduct by nonlawyers or any inability of nonlawyers to meet appropriate ethical standards (though fewer than a third of the agencies studied have actually defined any specific ethical standards). Of those that voiced complaints about nonlawyers' skills in representation, most indicated that the problem they encounter most frequently is nonlawyers' lack of familiarity with procedural rules and tactics. The majority of responses suggest that nonlawyers do not pose any special practice problems, nor do they receive any special disciplinary consideration. Overall, the concern for nonlawyers' competence and ethical conduct seems limited, perhaps because nonlawyer practice is not widespread.

III. Methodology

Throughout the survey our questions focused on lay representation (other than self-representation) occurring in adjudicatory proceedings. In question 1, in which we asked whether agencies permitted nonlawyer representation, we attempted to distinguish between adversarial and nonadversarial proceedings. Our distinction did not prove particularly informative because all agencies permitting nonlawyer practice (97%) allow such practice in both arenas.

Question 2 sought the methods by which agencies control or limit those practicing before them. The responses vary considerably from agency to agency. Questions 3 and 4 requested statistics concerning the frequency of nonlawyer practice. Many of the agencies indicated that statistics were unavailable. These responses also vary considerably. The results of questions 1 through 4 are tabulated in Chart I.

CHART I

REGULATIONS GOVERNING NONLAWYER REPRESENTATION, FREQUENCY, AND TYPE OF PRACTICE

Agency	Statute/ Regulation Permitting Appearance	Permits Nonlawyer Adversarial Representation	Permits Nonlawyer Nonadversarial Representation	Provisions Limiting or Governing Practice	Frequency of Nonlawyer Representation	Change in Frequency of Nonlawyer Rep. w/in Past 6 Years	Most Common Type(s) of Nonlawyer Representation
Bd. of Immigration Appeals: Immigration and Naturalization Serv.	8 CFR § 292.1-3	Yes	Yes	"Accredited representative"[1] working for "recognized organization"[2] may charge only nominal fees. "Reputable individual"[3] may not charge fees	No statistics available	No statistics available	One time only by family member/ friend; charitable, religious or social service organization
Civil Aeronautics Bd.	14 CFR § 300.1-6 14 CFR § 302.11	Yes	Yes	None	Fewer than 6 appearances per yr., less than 1% of appearances[4]	None	Economic consultants for corporations
Comptroller of the Currency	12 CFR § 19.3	Yes[5]	Yes	Nonlawyer may be required to file a power of attorney or show to the satisfaction of the Comptroller the possession of requisite qualifications	None	None	None

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1. May become accredited by the Department of Immigration Appeals (D.I.A) by submitting an application through a recognized organisation for review of character and fitness and experience with and knowledge of immigration law. No formal testing requirement or licensing fee.

2. Typically a religious, charitable or social service organisation becomes recognised by submitting an application for approval to the D.I.A. assuring that it will charge only nominal fees and assess no representation charges.

3. Typically a family member or friend submits declaration that he or she charges no fee, has a preexisting relationship with immigrant-applicant, and appears only on individual basis at request of immigrant-applicant.

4. Although nonlawyer practice not discouraged, complexity of agency proceedings tends to require specialized legal practice. Typical parties, large corporations or businesses, tend to hire lawyers.

5. Permitted but lay representation rare because of complex proceedings and substantial rights or amounts of money involved.

CHART I

REGULATIONS GOVERNING NONLAWYER
REPRESENTATION, FREQUENCY, AND TYPE OF PRACTICE

Agency	Statute/ Regulation Permitting Appearance	Permits Nonlawyer Adversarial Representation	Permits Nonlawyer Nonadversarial Representation	Provisions Limiting or Governing Practice	Frequency of Nonlawyer Representation	Change in Frequency of Nonlawyer Rep. w/in Past 6 Years	Most Common Type(s) of Nonlawyer Representation
Dep't of Justice, Drug Enforcement Admin.	21 CFR § 1316.50	Yes	N/A, all proceedings adversarial	None	2 to 3 appearances per yr., 5% of appearances[9]	None	One time only by officer/ employee of small family-owned business
Dep't of Justice, Foreign Claims Settlement Comm'n	45 CFR § 500.1-6	No	No[10]	Lawyers' fees set by statute at 10% of claim award and deducted from award	N/A[11]	N/A[11]	Family member providing assistance prior to appearance
Dep't of Labor, Benefits Review Bd.	20 CFR § 802.201(b) 20 CFR § 802.202	Yes	N/A, all proceedings adversarial	Employer pays fee for successful claimant represented by lawyer; claimant pays fee when represented by nonlawyer; lawyer may acquire lien against award; nonlawyers may not.[12] Professional status is criterion for determining fee.[13]	2-4% of appearances	None	Repeated practic for fee

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[9] Appearances are by the employees or officers of small family-owned businesses, analogous to pro se appearances.

[10] The agency only allows "representation" by bar members. Family members may sometimes assist in preparation of claims or at oral hearings, typically where elderly parent has language barrier problems.

[11] No nonlawyer representation allowed.

[12] These policies may tend to discourage lay representation.

[13] Typically approved rates for nonlawyers are less than half of those attorneys receive.

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REGULATIONS GOVERNING NONLAWYER
REPRESENTATION, FREQUENCY, AND TYPE OF PRACTICE

Agency	Statute/ Regulation Permitting Appearance	Permits Nonlawyer Adversarial Representation	Permits Nonlawyer Nonadversarial Representation	Provisions Limiting or Governing Practice	Frequency of Nonlawyer Representation	Change in Frequency of Nonlawyer Rep. w/in Past 6 Years	Most Common Type(s) of Nonlawyer Representation
Federal Energy Regulatory Comm'n	18 CFR § 385.2101	Yes	Yes	None	1 or 2 per yr.	None	Engineering firm assisting in technical nonadversarial proceeding
Federal Maritime Comm'n	46 CFR § 502.30	Yes	Yes	Only registered nonlawyers permitted to appear[16]	.5 to 1% of appearances	None	One time only by family member/ friend; non-fee by industry rep., consultant or private service agency
Federal Mine Safety & Health Review Comm'n	29 CFR § 2700.3(b)	Yes, at trial hearings before A.L.J.'s; at appellate reviews before commissioners	N/A	Nonlawyer may practice only if party, "representative of miners,"[17] or owner, partner, full time officer or employee of party-business entity; otherwise permitted to appear for limited purpose in special proceedings.	5-10% of appearances	None	Non-fee by industry rep., consultant or private service agency
General Accounting Office	31 U.S.C. § 731-732; 4 CFR §§ 11 and 28; GAO Orders 2713.2, 2752.1, and 2777.1	Yes, in adverse actions, grievance proceedings, and discrimination complaints	Yes	Nonlawyers not permitted fees; government pays fees to winning representatives.[18]	Very infrequent	Not aware of any	---

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[16] Certificates of registration are issued on payment of $13.00 processing fee and completion of application form indicating sufficient educational qualifications and recommendations. There is no testing or formal licensing.

[17] See generally 30 CFR § 40.1(b).

[18] As provided in discrimination statutes, backpay act, and appeals authorized by law.

CHART I

REGULATIONS GOVERNING NONLAWYER
REPRESENTATION, FREQUENCY, AND TYPE OF PRACTICE

Agency	Statute/ Regulation Permitting Appearance	Permits Nonlawyer Adversarial Representation	Permits Nonlawyer Nonadversarial Representation	Provisions Limiting or Governing Practice	Frequency of Nonlawyer Representation	Change in Frequency of Nonlawyer Rep. w/in Past 6 Years	Most Common Type(s) of Nonlawyer Representation
National Transportation Safety Bd.	49 CFR § 821 49 CFR § 831 49 CFR § 845	Yes	Yes	In adjudication lawyer representation encouraged; in investigation lawyer participation discouraged because technical expertise required; parties[25] participate in investigations	Very infrequent except at investigatory levels	None	Manufacturers a investigatory levels
Occupational Safety and Health Review Comm'n	29 CFR § 2200.22	Yes	N/A, all proceedings adversarial	Optional simplified procedures to encourage self-representation by small businesses	20% of appearances[26]	20% decrease[27]	Nonlegal employee represen ing employer; union represent tive
Small Business Admin.	13 CFR § 121.11 13 CFR § 134.16	Yes	N/A, all proceedings adversarial	None	Less than 1% of appearances[28]	None	---

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25. "Parties" includes manufacturers, unions, operators and other regulatory agencies.

26. Statistic includes pro se representation.

27. Nonlawyer practice accounted in 1980 for 40% of the agency's caseload but decreased in 1982-83 to 20%. Decrease may result from increasing complexity in cases causing claimants to seek legal representation.

28. Figure excludes pro se appearances in size and Standard Industrial Classification (SIC) Appeals. Approximately 50% of size and SIC appeals ar conducted pro se by nonlawyers.

CHART II

COMPARATIVE FREQUENCY OF VARIOUS TYPES OF LAY PRACTICE

Agency	One Time Only-Family/ Friend	Repeated Practice for Fee	Non-Fee by Legal Services Paralegal	Non-Fee by Industry Rep., Consultant, or Private Service Agency	Nonlawyer Assistance Prior to Appearance	Suspended or Disbarred Lawyer	Other
Bd. of Immigration Appeals: Immigration and Naturalization Serv.	C	NP, only nominal fees charged	U	C	C	NP: 8 CFR § 292.3	---
Civil Aeronautics Bd.	N	U	N	U	---	N	U - Corp. economic consultants
Comptroller of Currency	N	N	N	N	N	N	---
Consumer Prod. Safety Comm'n	U	N	N	U	N	N	---
Dep't of Agric. Agricultural Mktg. Serv.	U	N	N	N	C, economists or accountants, either employees or specially retained	N	---
Dep't of Commerce, Office of Secretary	U	N	---	C, union reps.	---	---	---
Dep't of Commerce, Patent and Trademark Office	U	C	NP	NP	C	U	U - Authorized corporate or association officer appearing in trademark case
Dep't of Health and Human Services, Food and Drug Admin.	U	U	N	N	U	N	Consulting firms specializing in food and drug matters (compliance and safety testing)

KEY

C - Common
U - Uncommon
N - Never
NP - Not Permitted

CHART II

COMPARATIVE FREQUENCY OF VARIOUS TYPES OF LAY PRACTICE

Agency	One Time Only-Family/ Friend	Repeated Practice for Fee	Non-Fee by Legal Services Paralegal	Non-Fee by Industry Rep., Consultant, or Private Service Agency	Nonlawyer Assistance Prior to Appearance	Suspended or Disbarred Lawyer	Other
Fed. Mine Safety and Health Review Comm'n	U	U	U	U, union reps./ small mine owners or employees	---	N	---
General Accounting Office	U	NP	U	U	U	NP	---
Interstate Commerce Comm'n	U	C	U	U	C	U	---
Nat'l Credit Union Admin.	N	N	N	N	C, in non-adversarial proceedings	N	Credit Union reps., in nonadversarial proceedings
Nat'l Mediation Bd.	U	C, by union reps.	N	N	C	N	---
Nat'l Transp. Bd.	U	C, manufacturers, unions, operators, and other federal regulatory agencies participate at investigations	N	N	C, manufacturers, unions, operators, and other federal regulatory agencies participate at investigations	N	---
Occupational Safety and Health Review Comm'n	C	U, includes certified safety reps.	N	U	C, in pro se appearances	N	---
Small Business Admin.	U	U	U	U	U	U	---
Social Security Admin.	C	C	C	U	(not known)	N	
U.S. Cust Serv.	U	C, customs brokers	N	U	C	N	---

CHART III

AGENCY EXPERIENCE WITH NONLAWYER MISCONDUCT AND DISCIPLINARY MECHANISMS

Agency	Problems w/ Nonlawyers' Incompetence or Unethical Conduct	Problems Differ in Kind from Problems w/ Lawyers	Problems Differ in Frequency from Problems w/ Lawyers	Special Disciplinary Branch or Mechanism	Manner in Which Practitioners Disciplined	Has Promulgated Ethical Standards	Nonlawyers Disciplined Differently from Lawyers
Bd. of Immigration Appeals: Immigration and Naturalization Serv.	No	No	No	Yes, 8 CFR § 292.3	Fourteen grounds for disbarment or suspension; loss of accreditation, recognition or license	Yes	No
Civil Aeronautics Bd.	No	N/A	N/A	Yes, 14 CFR § 300.20	Disqualification and temporary or permanent denial of appearance privileges	No	No
Comptroller of the Currency	No	N/A	N/A	No specific branch	Disqualification or exclusion from hearings by ALJ's	No	No
Consumer Product Safety Comm'n	No	N/A	N/A	Yes, 16 CFR § 1025.66 (b) and (d)	Exclusion from proceedings by ALJ's	Yes; not modeled after specific standards; language general to afford flexibility.	No
Dep't of Agric., Agricultural Marketing Serv.	No	No	No	Yes, 7 CFR § 900.60(2)	Preclusion from further representation	No	No
Dep't of Commerce, Office of Secretary	Yes, unfamiliar with trial tactics	Yes, *see supra*	Yes, *see supra*	No	Lawyers referred to state bar	No	No
Dep't of Commerce, Patent and Trademark Office	No	No	No	Yes, 37 CFR § 1.348	Suspension, exclusion or reprimand	Yes; 37 CFR §§ 1.344-1.346; modeled after ABA Model Code of Professional Responsibility	No
Dep't of Health and Human Services, Food and Drug Admin.	No	No	No	Yes, 21 CFR § 12.60(n)	Exclusion from hearings or other disciplinary action	21 CFR § 19; ethical code for government service and former employees	No

CHART III

AGENCY EXPERIENCE WITH NONLAWYER MISCONDUCT AND DISCIPLINARY MECHANISMS

Agency	Problems w/ Nonlawyers' Incompetence or Unethical Conduct	Problems Differ in Kind from Problems w/ Lawyers	Problems Differ in Frequency from Problems w/ Lawyers	Special Disciplinary Branch or Mechanism	Manner in Which Practitioners Disciplined	Has Promulgated Ethical Standards	Nonlawyers Disciplined Differently from Lawyers
Dep't of Transp., Maritime Admin.	No experience	N/A	N/A	No	Suspension or disbarment; see 46 CFR § 201.24	No	---
Dep't of Treasury, Internal Revenue Serv.	No	No	No	Yes	See Treasury Dep't Circular 230	Yes; modeled in part after relevant rules of professional conduct applicable to legal and accounting professions, ABA formal opinions and federal statutes tailored to meet specific needs of I.R.S.	No
Fed. Deposit Ins. Corp.	No	N/A	N/A	No	Exclusion or suspension from hearing	Nonlawyer reps. required to demonstrate requisite qualifications which vary according to subject matter involved.	No
Fed. Energy Regulatory Comm'n	No	N/A	N/A	Yes, 18 CFR § 383.2102	Disqualification or denial of appearance privilege	No; requires conduct conforming with standards governing appearances before the courts of the U.S.; see Texas Sea Rim Pipeline, Inc., and 17 Fed. Energy Reg. Comm'n Reporter [illegible] 502 (CCH)	No
Fed. Mari e Comm'n	Yes, unfamiliar with rules of	Yes, because of infrequent	Yes, see supra	[illegible], except as provided in 46 CFR § 502.30	Practitioners disciplined by commissioners	Yes; 46 CFR § 502.30	

CHART III

AGENCY EXPERIENCE WITH NONLAWYER MISCONDUCT AND DISCIPLINARY MECHANISMS

Agency	Problems w/ Nonlawyers' Incompetence or Unethical Conduct	Problems Differ in Kind from Problems w/ Lawyers	Problems Differ in Frequency from Problems w/ Lawyers	Special Disciplinary Branch or Mechanism	Manner in Which Practitioners Disciplined	Has Promulgated Ethical Standards	Nonlawyers Disciplined Differently from Lawyers
Occupational Safety and Health Review Comm'n	No	N/A	N/A	No	N/A	No	N/A
Small Business Admin.	None	N/A	N/A	None	Issues notices or shows cause that misconduct be resolved in court proceedings	Yes, 13 CFR § 134.16(d), governs lawyers only; modeled after standards of ethical conduct required before the courts of the U.S.	No
Social Security Admin.	Yes, though infrequently	Yes, failure to petition agency before collecting fees	Yes, *see supra*	Yes	Suspension or disqualification from practice before agency after investigation and full trial-type proceeding	No	No
U.S. Customs Serv.	No	N/A	N/A	No	N/A		N/A
U.S. Environmental Protection Agency	---	---	---	No	Presumably by contempt citation from ALJ	No; standards of ethical conduct required before courts of the U.S., 40 CFR § 164.30	No
U.S. Int'l Trade Comm'n	No	---	---	No	Disbarment from practice before agency or referral to state bar	No	---

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APPENDIX B

PARTICIPANT INVOLVEMENT IN REQUEST FOR HEARING CASES

FOR FISCAL YEAR 1983

Prepared by: DSS/OHA
May 1984

HIGHLIGHTS for Fiscal Year 1983

Profile of Participant Involvement at HEARINGS HELD

Profile of Participants	Percent of Involvement	Change From FY 1982
Claimant	97.8%	0.0%
Attorney	64.2%	+ 5.4%
Other (family, friend)	38.3%	+ 1.5%
Vocational Expert (VE)	17.4%	+ 2.1%
Non-Attorney	15.5%	+ 1.1%
Medical Advisor	5.6%	+ 1.2%
Translator	3.3%	- 0.1%
Claimant's Physican	1.6%	+ 0.2%

Attorney and Non-Attorney Representation and Reversal Rates for TOTAL DISPOSITIONS

- o 50.5% of all the dispositions in FY 83 had attorney involvement and 12.6% had non-attorney involvement.
- o Because both an attorney and a non-attorney were present in 1.4% of the cases, a total of 61.7% of the dispositions were represented.
- o The reversal rate of those claimants represented by an attorney was 59.0% compared to 46.1% for those claimants without an attorney.
- o Of the 61.7% of the claimants represented, the reversal rate was 58.1%. For those claimants not rppresented the reversal rate was 43.7%.

PARTICIPANT INVOLVEMENT
IN REQUEST FOR HEARING CASES
FOR FISCAL YEAR 1983

REQUESTS FOR HEARING IN WHICH A HEARING WAS HELD

The FY 1983 participant profile listed in decreasing order of involvement during a hearing included: claimant, attorney, other, vocational expert (VE), non-attorney, medical advisor, translator and claimant's physician (Table 1). There averaged 2.4 participants per hearing held; however, the highest incidence was 2.6 participants for DI reversals and the lowest incidence was 1.9 participants for RSI dismissals, RSI affirmations, and HI affirmations.

Data available since fiscal year 1977 for types of participants at total hearings held (Table 2) clearly depicted the changing trends of participant involvement. Attorney involvement increased from 36.8 percent in 1977 to an all time high of 64.2 percent in 1983; whereas, non-attorney involvement fluctuated between 10.4 percent in 1977 to 15.5 percent in 1983. However, VE usage had slowly increased from 13.7 percent in 1980 to 17.4 percent in 1983, yet still far below the high levels experienced in the late 70's. The numbers for the rest of the participants remained relatively unchanged.

Data for attorney and non-attorney combinations (Table 3) revealed that during 1983, over three quarters (77.8 percent) of the hearings had either an attorney or a non-attorney present at the hearing and the reversal rate of these cases was 58.7 percent, which was above the national average of 55.4 percent. The remaining 22.2 percent of the hearings with either no attorney or no non-attorney involvement had a reversal rate of 44.1 percent.

TOTAL REQUESTS FOR HEARING DISPOSITIONS

Attorney and non-attorney may be involved with a case even though a hearing may not be held. For all dispositions during fiscal year 1983, the overall percentage for attorneys reached an all time high of 50.5 percent; whereas, non-attorneys accounted for 12.6 percent (Tables 4 and 5). It must be emphasized that this included all programs (which have considerable variations). Attorneys ranged from 58 percent for DI to 18 percent for HI. Whereas, non-attorneys had less variation (from 21 percent for SSI-ONLY to 9 percent for RSI, DI and BL).

Data for attorney and non-attorney combinations (Table 6) revealed that during 1983, 61.7 percent of the dispositions had either attorney or non-attorney representation and these cases had a reversal rate of 58.1 percent; whereas, the remaining 38.3 percent of dispositions with either no attorney or no non-attorney representation had a reversal rate of 43.7 percent. The overall reversal rate for total dispositions was 52.7 percent.

Table 1. Percentage Distribution Based on Total Hearings Held by Type of Participant and Average Number of Participants per Hearing Held by Type of Disposition and by Program, Social Security Administration, Office of Hearings and Appeals, National Data, Fiscal Year 1983

Type of Disposition by Program	Percentage Distribution by Type of Participant: Claimant	Vocational Expert	Attorney	Other1/	Non-Attorney2/	Medical Advisor	Translator	Claimant's Physician	Average Number Of Participants
Dismissals: Account for 0.9 percent of the hearings held.									
RSI	91.2	-	50.9	35.1	12.3	-	1.8	-	1.9
DI	93.5	15.2	68.0	29.8	13.7	4.9	3.1	1.7	2.3
HI	56.1	2.4	58.5	65.9	24.4	9.8	2.4	14.6	2.3
BL	100.0	-	-	100.0	-	-	-	-	2.0
SSI-ONLY	91.8	12.3	47.5	37.3	23.6	5.3	4.8	1.0	2.2
SSI-CONC	90.0	14.2	58.4	27.1	23.6	3.4	5.4	0.5	2.2
Combined	91.6	13.8	61.3	31.1	18.2	4.5	4.0	1.4	2.3
Affirmations: Account for 43.6 percent of the hearings held.									
RSI	95.6	0.8	41.2	38.3	12.1	0.2	1.7	0.1	1.9
DI	98.8	19.2	67.6	33.4	10.6	5.3	2.5	1.1	2.4
HI	48.4	0.3	39.4	53.7	27.1	18.7	1.5	2.7	1.9
BL	94.5	1.8	61.8	30.9	10.9	5.5	-	1.8	2.1
SSI-ONLY	97.0	9.1	38.7	37.7	25.3	3.0	8.2	0.4	2.2
SSI-CONC	98.9	14.5	53.7	33.4	18.7	3.1	4.3	0.5	2.3
Combined	98.2	15.8	58.5	34.3	15.3	4.3	3.9	0.8	2.3
Reversals: Account for 55.5 percent of the hearings held.									
RSI	94.9	1.2	51.7	46.1	12.8	0.8	2.1	0.4	2.1
DI	98.3	20.8	75.9	40.3	10.4	7.2	1.8	2.6	2.6
HI	44.0	1.1	36.9	55.3	31.5	30.7	0.3	2.8	2.0
BL	95.1	12.2	63.4	34.1	19.5	9.8	-	-	2.3
SSI-ONLY	96.2	12.4	47.5	45.7	30.8	5.6	6.2	1.2	2.5
SSI-CONC	98.4	17.8	62.0	42.0	21.4	5.5	3.4	1.5	2.5
Combined	97.7	18.7	68.7	41.5	15.6	6.7	2.7	2.2	2.5
All Types: Account for 100.0 percent of the hearings held.									
RSI	95.3	0.9	45.1	41.0	12.3	0.4	1.8	0.2	2.0
DI	98.5	20.1	72.5	37.4	10.5	6.4	2.1	2.0	2.5
HI	46.1	0.8	38.4	55.0	29.5	25.4	0.8	3.1	2.0
BL	94.8	6.2	61.9	33.0	14.4	7.2	-	1.0	2.2
SSI-ONLY	96.5	10.8	43.1	41.6	28.0	4.3	7.2	0.8	2.3
SSI-CONC	98.6	16.2	58.1	37.8	20.2	4.3	3.9	1.0	2.4
Combined	97.8	17.4	64.2	38.3	15.5	5.6	3.3	1.6	2.4

1/ Other includes family, friend, etc.
2/ Non-attorney representative includes legal aide, social worker, etc.
Symbol used in table: - quantity equals zero.
SOURCE OF DATA: OHA-Case Control System.

Table 2. Percentage Distribution Based on Total Hearings Held by Type of Participant and Average Number of Participants per Hearing Held, Social Security Administration, Office of Hearings and Appeals, National Data, Fiscal Years 1977 Through 1983

Fiscal Year	Percentage Distribution by Type of Participant								Average Number of Participants
	Claimant	Vocational Expert	Attorney	Other1/	Non-Attorney2/	Medical Advisor	Translator	Claimant's Physician	
1977	93.8	38.0	36.8	35.9	10.4	4.2	3.5	1.5	2.2
1978	97.6	43.1	39.9	38.0	12.0	4.6	3.5	1.2	2.4
1979	97.7	28.8	42.5	38.3	13.4	4.5	3.6	1.3	2.3
1980	97.9	13.7	48.0	37.7	15.5	3.9	4.0	1.4	2.2
1981	97.8	14.3	55.0	36.9	17.7	4.1	3.8	1.3	2.3
1982	97.8	15.3	58.8	36.8	14.4	4.4	3.4	1.4	2.3
1983	97.8	17.4	64.2	38.3	15.5	5.6	3.5	1.6	2.4
Change 1982 to 1983	0.0	+2.1	+5.4	+1.5	+1.1	+1.2	-0.1	+0.2	+0.1

1/ Other includes family, friend, etc.

2/ Non-attorney includes legal aide, social worker, etc.

3/ New vocational evaluation regulations changed vocational expert usage in February 1979, 5 months into the fiscal year. The vocational expert prior to February 1979 had the responsibility to provide evidence which supported the conclusion that the claimant could or no longer could engage in his/her usual occupation and to determine what jobs, if any, the claimant could do. However, the vocational evaluation regulations promulgated in February 1979 required the ALJ to apply the sequential evaluation thereunder and, if appropriate, the charts appearing in the regulations. Therefore, not only was the utilization of VEs reduced but the role of the VE changed somewhat to conform with the regulations.

SOURCE OF DATA: OHA-Case Control System.

Table 3. Reversal Rates of Total Hearings Held With and Without the Presence of Attorneys and Non-Attorney Representatives, Social Security Administration, Office of Hearings and Appeals, National Data, Fiscal Years 1977 Through 1983

	Reversal Rates of Hearings Held								
Fiscal Year	With Attorney	Without Attorney	With Non-Atty	Without Non-Atty	With Both Attorney and Non-Atty	Without Both Attorney and Non-Atty	With Either Attorney or Non-Atty	Without Either Attorney or Non-Atty	Total Hearings Held
1977	59.7%	45.7%	57.1%	50.1%					50.8%
1978	62.1%	49.6%	60.1%	53.8%					54.6%
1979	63.5%	52.5%	61.6%	56.5%					57.2%
1980	64.3%	53.6%	61.6%	58.2%					58.7%
1981 1/	62.3%	51.5%	58.5%	57.2%	61.3%	57.3%	61.3%	48.0%	57.4%
1982	59.6%	48.1%	56.0%	54.7%	58.7%	54.8%	58.9%	44.4%	54.9%
1983	59.3%	48.5%	56.0%	55.3%	58.8%	55.4%	58.7%	44.1%	55.4%
Change 1982 to 1983	-0.3%	+0.4%	0.0%	+0.6%	+0.1%	+0.6%	-0.2%	-0.3%	+0.5%

1/ FY 1981 is the first time that data are available for attorneys and non-attorney both present together during a hearing.

Note: The 1983 percentages of hearings held by attorney/non-attorney combinations are:

64.2% with attorneys,
15.5% with non-attorneys,
1.9% with both attorney and non-attorney,
77.8% with either attorney or non-attorney.

SOURCE OF DATA: OHA-Case Control System.

Table 4. Percentage Distribution of Attorneys and Non-Attorney Representation in Total Disposition by Type of Disposition and by Program, Social Security Administration, Office of Hearings and Appeals, National Data, Fiscal Year 1983

Type of Disposition by Program		Percentage Distribution	
		Attorney	Non-Attorney 1/
Dismissals	RSI	6.1	3.1
	DI	11.0	3.6
	HI	2.4	1.7
	BL	9.1	0.0
	SSI-ONLY	6.2	7.8
	SSI-CONC	9.5	7.6
	COMBINED	9.3	5.5
Affirmations	RSI	34.3	10.2
	DI	61.3	9.7
	HI	24.4	16.6
	BL	50.7	8.7
	SSI-ONLY	33.2	21.9
	SSI-CONC	49.0	17.3
	COMBINED	52.4	13.8
Reversals	RSI	42.5	10.8
	DI	62.9	8.8
	HI	26.8	22.4
	BL	48.2	14.3
	SSI-ONLY	37.6	24.6
	SSI-CONC	51.9	18.1
	COMBINED	56.6	13.1
All Types	RSI	31.8	9.1
	DI	58.5	8.7
	HI	17.6	13.5
	BL	43.5	9.5
	SSI-ONLY	31.6	21.3
	SSI-CONC	46.1	16.6
	COMBINED	50.5	12.6

1/ Non-Attorney representative includes legal aide, social worker, etc.

SOURCE OF DATA: OHA-Case Control System.

Table 5. Percent Distribution of Attorney and Non-Attorney Representation in Total Dispositions by Program, Social Security Administration, Office of Hearings and Appeals, National Data, Fiscal Years 1967 Through 1983.

	Percentage Distribution by Program							
	RSHI		BL		SSI		Combined	
Fiscal Year	Attorney	Non-Attorney	Attorney	Non-Attorney	Attorney	Non-Attorney	Attorney	Non-Attorney
1967	19%	7%					19%	7%
1968	19%	7%					19%	7%
1969	20%	6%					20%	6%
1970	20%	6%					20%	6%
1971	21%	6%					21%	6%
1972	29%	11%					29%	11%
1973	34%	12%					34%	12%
1974	36%	12%	35%	10%			36%	12%
1975	36%	10%	42%	12%			37%	10%
1976	41%	11%	55%	12%			44%	11%
1977	33%	8%	61%	5%	21%	13%	28%	10%
1978	39%	9%	66%	5%	25%	16%	32%	12%
1979	42%	9%	59%*	9%*	28%	18%	35%	13%
1980	49%	10%	51%*	7%*	32%	21%	41%	15%
1981	50%	8%	39%*	14%*	33%	19%	42%	14%
1982	51%	7%	36%*	8%*	35%	16%	44%	11%
1983	57%	9%	44%*	10%*	40%	18%	50%	13%
Change 1982 to 1983	+6%	+2%	+8%*	+2%*	+5%	+2%	+6%	+2%

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* BL accounts for less than 0.05 percent of the total workload.

SOURCE OF DATA: Fiscal Years 1967 through 1976, OHA HA-503 Data Base (Excludes Transition Quarter); Fiscal Years 1977 through 1983, OHA-Case Control System.

Table 6. Reversal Rates of Total Dispositions With and Without the Presence of Attorneys and Non-Attorney Representatives, Social Security Administration, Office of Hearings and Appeals, National Data, Fiscal Years 1977 Through 1983

	Reversal Rates of Dispositions								
Fiscal Year	With Attorney	Without Attorney	With Non-Atty	Without Non-Atty	With Both Attorney and Non-Atty	Without Both Attorney and Non-Atty	With Either Attorney or Non-Atty	Without Either Attorney or Non-Atty	Total Dispositions
1977	57.8%	39.4%	53.0%	43.7%					47.0%
1978	60.5%	44.1%	56.6%	48.4%					49.3%
1979	62.1%	48.0%	58.9%	52.1%					53.0%
1980	63.0%	50.7%	59.3%	55.1%					55.8%
1981 1/	61.9%	50.4%	57.7%	54.8%	61.3%	55.1%	60.9%	48.7%	55.2%
1982	59.5%	47.5%	55.5%	52.4%	58.7%	52.7%	58.7%	45.8%	52.7%
1983	59.0%	46.1%	54.5%	52.3%	58.8%	52.5%	58.1%	43.7%	52.7%
Change 1982 to 1983	-0.5%	-1.4%	-1.0%	-0.1%	+0.1%	-0.2%	-0.6%	-2.1%	0.0%

1/ FY 1981 is the first time that data are available for attorneys and non-attorneys both present together for a disposition.

NOTE: The 1983 percentage of dispositions by attorney/non-attorney combinations are:

50.5% with attorneys,
12.6% with non-attorneys,
1.4% with both attorney and non-attorney,
61.7% with either attorney or non-attorney.

SOURCE OF DATA: OHA-Case Control System.

BACKGROUND REPORT FOR RECOMMENDATION 86-2

USE OF THE FEDERAL RULES OF EVIDENCE IN FEDERAL AGENCY ADJUDICATIONS

Richard J. Pierce, Jr.

Report to the Administrative Conference of the United States

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On June 20, 1986, the Administrative Conference adopted Recommendation 86-2, Use of the Federal Rules of Evidence in Federal Agency Adjudications. The vigorous debate that preceded adoption of the recommendation focused on three primary goals.[1] First, the Conference expects the recommendation to produce greater uniformity among agencies and among presiding officers in their approach to evidentiary decision-making. Second, the Conference hopes to discourage Congress from enacting in new statutes or retaining in existing statutes[2] provisions that purport to mandate use of the Federal Rules of Evidence ("FRE") in agency adjudications. Most of the exclusionary provisions of the FRE, such as the hearsay rule and its many exceptions,[3] were promulgated to control fact-finding by lay jurors;[4] technical application of these rules directly in agency adjudications is unnecessary, inappropriate and counterproductive. Third, the Conference hopes to encourage agencies to assist presiding officers in their evidentiary decision-making by conferring clear discretion to exclude evidence the presiding officer considers unreliable, particularly when admission of such unreliable evidence is likely to require an inordinate amount of valuable hearing time.

The purpose of this study is to suggest the extent to which federal agencies should rely upon the FRE in conducting adjudicatory proceedings. At present, 1121 federal Administrative Law Judges ("ALJs") apply 280 different sets of evidentiary rules in the process of presiding over far more adjudicatory proceedings each year than are resolved in the federal courts. The evidentiary procedures now used in agency adjudications vary substantially along a spectrum from no reference to evidentiary rules at all,[6] to hortatory reference to the FRE as a source of guidance,[7] to mandatory incorporation of the FRE.[8]

During the period from 1940 through 1971, scholars and appellate judges engaged in a lively debate concerning the appropriate role of formal evidentiary rules in agency adjudications. Professor Davis devoted much of his scholarship during this period to developing and supporting his thesis that formal rules of evidence have no place in agency proceedings because of the many differences between agencies and courts.[9] Dean Gellhorn later joined him in this effort by writing what remains today the most complete statement of the case against the application of evidentiary rules designed to govern jury trials in agency adjudicatory proceedings.[10] Federal appellate courts declined to accept this thesis until the Supreme Court's 1971 opinion in Richardson v. Perales,[11] overruling the "legal residuum rule," seemingly invited agencies to admit evidence that would be inadmissible in a court by holding that an agency could predicate a finding of fact entirely on such evidence in some circumstances.

Since 1971 scholars have devoted little attention to the broad question of the evidentiary rules appropriate for use by federal agencies. The relatively little scholarly writing in this important area has been narrowly focused--either on the reaction of the courts of a particular state to the Supreme Court's holding in Richardson v. Perales[12] or on the unique issues that arise when an agency is urged to apply a constitutionally based exclusionary rule in an adjudicatory proceeding.[13]

It is important to revisit this significant issue at this time. Agencies are being asked to play an increasingly important role in the legal system, both as policy-makers and as administrators of "mass justice."[14] Their evidentiary regimes differ significantly--sometimes as a result of congressional decisions and sometimes as a result of voluntary adoption of rules more stringent than Congress required. Since 1971, Congress and the Court have adopted for the first time a complete set of evidentiary rules applicable to federal courts.[15] ALJs apply agency evidentiary rules in an uneven manner,[16] and reviewing courts experience difficulty in their attempts to review evidentiary rulings made under some of the rules of evidence adopted by agencies or imposed on them by Congress.[17]

The study consists of three parts. Part I is a description of the present state of the law, including the statutory framework in which agencies select evidentiary rules, the evidentiary regulations agencies have adopted, and judicial decisions interpreting and applying those statutes and regulations. Part II reports the results of a survey of ALJs with respect to the extent of their reliance on the FRE and their opinions concerning the relationship between the evidentiary rules they apply and several criteria of the fairness, efficacy, and efficiency of the adjudicatory proceedings over which they preside. Part III of the study includes analysis of the issues presented and recommendations concerning the appropriate role for the FRE in agency proceedings.

I. THE PRESENT STATE OF THE LAW

Statutes

There are two potential sources of statutory constraints on an agency's choice of evidentiary rules--the Administrative Procedure Act (APA) and agency organic acts. The only provision of the APA that relates to evidentiary issues is §556(d):

> Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.[18]

The language and legislative history of this provision leaves no doubt that, while Congress intended to limit agencies' power to base findings of fact on evidence of low quality, it also intended to permit agencies' discretion to decline to apply the rules of evidence that govern judicial trials.[19]

Many agency organic acts do not address evidentiary issues at all, except by incorporating the APA by reference. Of those that do address evidentiary issues, most either recite the APA standard verbatim or paraphrase that standard.[20] In a few statutes, however, Congress purported to limit the agency's discretion to admit evidence that would not be admissible in court. The statutory provision applicable to National Labor Relations Board (NLRB) adjudications illustrates the nature of the constraint most frequently imposed:

> Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the District Courts of the United States under the Rules of Civil Procedure for the District Courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.[21]

Agency Regulations

There are 280 regulations that govern evidentiary decision-making by federal agencies. Most agencies have a single evidentiary regulation applicable to all adjudications, but some distinguish among proceedings of different types or conducted under different statutes.[22] Agency evidentiary regulations differ considerably in their precise language, but they can be divided initially into two general categories. The majority--243 of 280--make no reference to the FRE and appear not to impose any constraints on the discretion of Administrative Law Judges to admit evidence. Often these provisions either parrot the APA or paraphrase it. The other 37 evidentiary regulations make some reference to the FRE.

Of the agency evidentiary regulations that include a reference to the FRE, most require use of the FRE "so far as practicable." In the case of NLRB,[23] Congress required the agency to adopt such an evidentiary regulation. In other cases, such as the Occupational Safety and Health Review Commission (OSHRC),[24] the Department of Interior (DOI),[25] Interstate Commerce Commission (ICC),[26] and Federal Communications Commission (FCC),[27] the agency apparently adopted the "so far as practicable" standard voluntarily. In a few cases, an agency's evidentiary regulation refers to the FRE, but only as a source of potentially useful guidance to ALJs. The Department of Labor's (DOL) evidentiary regulation illustrates this approach.[28] DOL's unusually long regulation begins with a general provision that describes the role of the FRE in DOL adjudications:

> (a) Applicability of Federal Rules of Evidence. Unless otherwise provided by statute or these rules, and where appropriate, the Federal Rules of Evidence may be applied to all proceedings held pursuant to these rules.

The contrast between the permissive reference to the FRE in the DOL regulation and the mandatory reference in the "so far as practicable" standard is evident. The DOL regulation goes on to paraphrase several Federal Rules, including Rule 103 (objections and offers of proof), Rule 402 (relevant evidence generally admissible), Rule 403 (exclusion of relevant evidence on grounds of prejudice, confusion, waste of time, or undue delay), and Rule 1006 (summaries admissible). The DOL regulation also expressly authorizes ALJs to limit the number of witnesses who testify on an issue and to limit the amount of cross-examination of witnesses in order to avoid prolonging the hearing or burdening the record--a power implicitly accorded federal judges by FRE 403.[29]

Judicial Interpretation of Statutes and Regulations

If an agency's statutory and regulatory provisions relating to admissibility of evidence incorporate only the APA standard, it seems impossible for an agency action to be reversed on the basis that the agency erroneously admitted evidence. Courts routinely decline to reverse agencies on this basis.[30] The converse does not follow, however. An agency action can be reversed solely because it refused to admit evidence that is admissible under the FRE.[31] This combination of holdings is based on the sensible reasoning that, while the special characteristics of agency proceedings justify admission of some evidence that is not deemed sufficiently reliable to be considered by lay jurors, there is no justification for agencies to refuse to consider at all evidence that is deemed sufficiently reliable to be considered even by lay jurors.[32]

Agencies that are bound by statute or regulation to adhere to the FRE "so far as practicable" standard may be subject to some judicially imposed constraints on their discretion to admit evidence that would not be admissible under the FRE. Courts have not interpreted and applied this standard in a consistent manner. Indeed, courts called upon to apply this standard seem troubled and confused in their responses. Their confusion is understandable. What does Congress or an agency mean when it mandates compliance with a detailed set of rules "so far as practicable"? Who is to determine when compliance is practicable--the ALJ, the agency, or a court? By what standards is such a determination to be made? What sanction should a court impose if an agency does not follow the FRE when a court believes that it was "practicable" for the agency to follow the FRE? The results of the cases decided under the "so far as practicable" standard suggest implicitly that courts are resolving these issues in very different ways, but none of the decisions to date contain sufficient analysis of the issues to determine the basis for the court's decision. Courts simply differ in result using broad conclusory language and declining to acknowledge the existence of contrary decisions of other courts.

Three circuit court decisions illustrate the disparate approaches taken in this area. In National Labor Relations Board v. Process and Pollution Control Co.,[33] the Tenth Circuit reversed the agency action in part because the agency admitted hearsay evidence inadmissible under the FRE when the court believed it was practicable for the agency to follow the FRE. In Helena Laboratories Corp. v. National Labor Relations Board,[34] the Fifth Circuit dismissed a similar argument summarily, noting only that the agency was required to follow the FRE only "so far as practicable." The Eighth Circuit completed the circle in National Labor Relations Board v. Addison Shoe Corp.[35] The court reversed the agency in part because it did not admit evidence made inadmissible by the FRE. The court admonished the agency for adhering to the FRE too strictly. Thus, some courts apparently interpret the "so far as practicable" standard to accord near total discretion to agencies. Other courts interpret it as a mandate to comply with the FRE except in unusual circumstances. Still others apparently view the standard as a mandate to admit evidence made inadmissible by the FRE except when unusual circumstances require application of the FRE.

Most disputes concerning agency decisions to admit or exclude evidence that reach the appellate court level involve admission or exclusion of hearsay; a few involve potential application of the "relevance rules" (FRE 404-411) or the "impeachment rules" (FRE 607-610).[36] In all of these evidentiary contexts, the resolution of the dispute by a reviewing court depends in part on whether the agency's evidentiary regulation incorporates the APA standard or the "so far as practicable" standard. In one important context, the standard adopted in the agency's evidentiary regulation is irrelevant to the resolution of the evidentiary dispute. Courts, agencies and commentators seem to be in agreement that all agencies must recognize claims of evidentiary privilege to the same extent that courts must recognize such claims.[37] This rule makes eminently good sense because the reasons for recognizing evidentiary privileges differ fundamentally from the reasons that support adoption of most evidentiary rules. Evidentiary privileges exist not because they further the truth-seeking function, but because forced disclosure of some types of information will cause substantial harm to other social values.[38] Since the harm resulting from forced disclosure of privileged information is identical whether the information is disclosed in a judicial proceeding or an administrative proceeding, the law of privileges should apply equally to both types of proceedings.

It is important to distinguish between judicial constraints on agency discretion to admit evidence that would not be admissible in a federal court and judicial review of agency findings of fact premised on such evidence. The Supreme Court approved the relaxation of formal rules of evidence in agency proceedings as early as 1904.[39] In 1916, however, the New York Court of Appeals announced the "legal residuum" rule in Carroll v. Knickerbocker.[40] That rule permitted agencies to continue to admit and to consider evidence that would not be admissible in a jury trial. The Court held impermissible, however, agency reliance exclusively on such inadmissible evidence as the basis for a finding of fact. An agency could base a finding in part on evidence inadmissible in a jury trial, if but only if, it also had a "residuum of legal evidence" in the record to support the finding.[41] Until 1971, federal courts applied the "legal residuum" rule in reviewing agency actions--after 1946 as an integral part of the "substantial evidence" standard made applicable by the APA to agency findings of fact adopted in formal adjudications.[42]

The "legal residuum" rule was the subject of near universal criticism both by evidence scholars and by administrative law scholars.[43] In 1971, the Court finally responded to this criticism by abolishing the rule. In Richardson v. Perales,[44] the Court held that an agency can base a finding on hearsay evidence that would be inadmissible in a jury trial, even when that evidence is contradicted by admissible evidence, if the evidence relied upon by the agency is of a type relied upon by a reasonably prudent person in conducting his affairs. Federal courts have applied this standard in reviewing agency findings of fact ever since--independent of whether the agency's evidentiary rule incorporates the APA standard of admissibility or the "so far as practicable" standard. Scholars have reacted to the abolition of the "legal residuum" rule with enthusiastic approval.[45]

II. SURVEY OF ADMINISTRATIVE LAW JUDGES

Since ALJs preside over the majority of federal administrative adjudications, it seemed desirable to find out the extent to which they rely upon the FRE as a basis for their evidentiary ruling, as well as their opinions concerning the effectiveness of the rules they must apply and the evidentiary rules they would prefer to apply if they could change the rules now in effect at their agencies. To this end, a questionnaire was sent to 603 of the 1121 ALJs. Responses were received from 212 ALJs, for a response rate of 35%. The distribution of responses by agency corresponded generally to the aggregate distribution of ALJs.[46]

The questionnaire included questions intended to elicit information in four areas: (1) the ALJ's experiential basis for engaging in comparative evaluation of the evidentiary standard adopted by the agency for which she presides; (2) the ALJ's evaluation of the effectiveness of the evidentiary standard she is required to apply in terms of fairness to the parties, discretion to admit evidence the ALJ considers reliable, discretion to exclude evidence the ALJ considers unreliable, discretion to exclude evidence in the interests of expediting a proceeding, and sufficiency of guidance provided to permit rulings to be made promptly and with confidence in their accuracy; (3) the evidentiary standard the ALJ would prefer to use as the basis for evidentiary rulings; and, (4) the extent to which the ALJ uses the FRE as a source of guidance in making evidentiary rulings.

The questionnaire results were divided into four groups for purposes of evaluating the pattern of responses--(1) ALJs at agencies other than the Social Security Administration (SSA) that have adopted the APA evidentiary standard, (2) ALJs at SSA, (3) ALJs at agencies that have adopted the FRE "so far as practicable" standard, and (4) ALJs at DOL, where the agency's evidentiary regulation refers to the FRE as a permissive source of guidance and incorporates several of the FRE explicitly.[47] ALJs at SSA were evaluated as a separate group to avoid potential distortion of the evaluation of the responses of ALJs at other agencies that have adopted the APA evidentiary standard. Arguably, the nature and function of SSA adjudications differ significantly from the nature and function of adjudicatory proceedings at other agencies.[48] Unarguably, ALJs at SSA constitute such a disproportionately large subset of total ALJs that their responses would swamp the evaluation of total responses. Of the 1121 federal ALJs, 760 preside at SSA. Similarly, 113 of the 212 responses received came from SSA ALJs. SSA dominates the group of ALJs who preside at agencies that have adopted the APA evidentiary standard to an even greater extent--113 of the 144 responses from this group came from SSA.

Before reporting these disaggregated results, it is useful to note one generalization. A majority of ALJs in each of the three groups expressed the opinion that the evidentiary standard adopted by their agencies produced satisfactory results when judged with reference to each of the performance criteria mentioned on the questionnaire, and a majority of ALJs in each group expressed a preference for the evidentiary standard adopted by their agency. This result is ambiguous. It could give rise to an inference that the present disparate pattern of evidentiary regulations yields a near perfect matching of evidentiary regimes with the unique functions of each agency, *e.g.*, FCC and ICC should rely much more heavily on FRE than should FERC or FTC (although it is difficult to identify functional distinctions among these agencies that would support this theory). Alternatively, the data could indicate merely that most ALJs, like most people, prefer not to change the rules under which they operate. I prefer the second explanation, in part because of significant differences among the groups in the size of the majority that expressed satisfaction with, and a preference for, the status quo, and in part because of the low level of experience with alternative evidentiary standards in all four groups. Of the 212 respondents, only 16 (7.5%) reported that their agency had changed its evidentiary standard during their tenure, and only 53 (25.2%) had presided at other agencies with different evidentiary standards.

The results of the survey are shown in the following tables

ALJS AT APA AGENCIES OTHER THAN SSA

	satisfied	not satisfied
fairness to parties	87.1%	12.9%
discretion to admit reliable evidence	96.8%	3.2%
discretion to exclude unreliable evidence	83.9%	16.1%
discretion to exclude evidence to expedite a proceeding	80.6%	19.4%
guidance to permit prompt and confident rulings	86.7%	13.3%

Preferred Rules

APA	"so far as practicable"	FRE
77.4%	22.6%	0%

Frequency of Use of FRE as Guidelines

always	frequently	occasionally	rarely	never
20.0%	40.0%	33.3%	3.3%	3.3%

ALJS AT SSA

	satisfied	not satisfied
fairness to parties	85.5%	14.5%
discretion to admit reliable evidence	96.4%	3.6%
discretion to exclude unreliable evidence	65.5%	34.5%
discretion to exclude evidence to expedite a proceeding	70.1%	29.9%
guidance to permit prompt and confident rulings	81.1%	18.9%

Preferred Rules

APA	"so far as practicable"	FRE
62.7%	33.6%	3.6%

Frequency of Use of FRE as Guidelines

always	frequently	occasionally	rarely	never
8.1%	15.3%	32.4%	26.1%	9.0%

ALJS AT "SO FAR AS PRACTICABLE" AGENCIES

	satisfied	not satisfied
fairness to parties	98.0%	2.0%
discretion to admit reliable evidence	100.0%	0.0%
discretion to exclude unreliable evidence	100.0%	0.0%
discretion to exclude evidence to expedite a proceeding	98.0%	2.0%
guidance to permit prompt and confident rulings	100.0%	0.0%

Preferred Rules

APA	"so far as practicable"	FRE
4.4%	80.0%	15.6%

Frequency of Use of FRE as Guidelines

always	frequently	occasionally	rarely	never
58.6%	34.5%	3.0%	0.0%	3.0%

ALJS AT DOL

	satisfied	not satisfied
fairness to parties	100.0%	0.0%
discretion to admit reliable evidence	100.0%	0.0%
discretion to exclude unreliable evidence	95.2%	4.8%
discretion to exclude evidence to expedite a proceeding	90.5%	9.5%
guidance to permit prompt and confident rulings	100.0%	0.0%

Preferred Rules

APA	"so far as practicable"	FRE
31.6%	47.4%	21.1%

Frequency of Use of FRE as Guidelines

always	frequently	occasionally	rarely	never
36.8%	36.8%	15.9%	10.5%	0.0%

The survey results support several other important inferences. The evidentiary standard adopted by an agency significantly affects the extent to which ALJs use the FRE as a source of guidance in making evidentiary rulings. 93.1% of ALJs at agencies with "so far as practicable" standards report that they use the FRE as a source of guidance either "always" or "frequently." This heavy reliance on the FRE contrasts sharply with the sparing reliance of ALJs at SSA--only 23.4% report use of the FRE "always" or "frequently." The degree of reliance reported by ALJs at DOL and APA agencies other than SSA falls between these two extremes, at 73.6% and 60.0%, respectively.

The results of the survey with respect to ALJs' satisfaction with the evidentiary standard they are required to apply vary substantially depending on the criteria of satisfaction employed. ALJs in all groups report near unanimous satisfaction with the adequacy of their discretion to admit evidence they consider reliable--the satisfaction rate varied among the groups of ALJs only from 96.4% to 100.0%. There was slightly greater variation in the rate of satisfaction reported with respect to an ALJ's power to conduct a proceeding that is fair to the parties. As measured by this criterion, the results ranged from 100.0% satisfaction reported by DOL ALJs down to 85.5% satisfaction reported by ALJs at APA agencies--a degree of variation that probably is not significant in light of the relatively small number of respondents in the two groups.[49]

The variation in reported satisfaction with respect to other criteria is considerably greater. As measured by adequacy of discretion to exclude evidence an ALJ considers unreliable, the degree of satisfaction reported ranged from 65.5% to 100.0%. Similarly, the range of responses with respect to adequacy of discretion to exclude evidence in order to expedite a proceeding varied from 70.1% to 98.0%, and with respect to adequacy of guidance to make a prompt and confident evidentiary ruling the variation was from 81.1% to 100.0%. With respect to each criterion, ALJs at SSA and at other APA agencies reported the lowest rate of satisfaction with the evidentiary standard they are required to apply, while ALJs at DOL and at agencies with a "so far as practicable" standard reported the highest rate of satisfaction.

It is apparent from the survey results that ALJs prefer the additional guidance and discretion to exclude evidence provided by the "so far as practicable" standard or the DOL standard, both of which refer to the FRE, to the open-ended APA standard. As interpreted and characterized by several of the respondents, the APA standard forces an ALJ to admit any evidence tendered even if the ALJ considers it clearly unreliable. The responses to the question asking ALJs which of three evidentiary standards they would prefer to apply reinforces this conclusion. While a majority of each group expressed a preference to retain the status quo, the size of the majority varied from only 62.7% of SSA ALJs who preferred to retain the APA standard adopted by that agency to 80.0% of ALJs at "so far as practicable" agencies who preferred to continue to apply that standard. Indeed, that variation understates the preference for the guidance and discretion to exclude provided by a standard that makes reference to the FRE for two reasons. First, of the 20.0% of "so far as practicable" ALJs who would prefer to apply a different standard, almost all (15.6%) expressed a preference for strict application of the FRE. Second, DOL ALJs were not given the option of expressing a preference to continue to apply the evidentiary standard unique to that agency. Had they been provided that option, it is fair to infer from their extremely high rate of reported satisfaction with the evidentiary standard they now apply (90.5% to 100.0% satisfaction depending on the criterion used) that they would have expressed near unanimous preference to retain that standard.

The final step in deriving meaning from the survey results is to attempt to infer reasons for ALJs' preference for an evidentiary standard that includes either a mandatory or a permissive reference to the FRE. The satisfaction responses differed significantly with respect to three criteria--adequacy of discretion to exclude evidence considered unreliable, adequacy of discretion to exclude evidence in order to expedite a proceeding, and adequacy of guidance to make prompt and confident rulings. The latter two criteria relate to the managerial role of judges and agencies--how can we resolve tens of thousands of disputes in a timely manner with limited resources? This issue is critically important to many judges and agency administrators because of its direct relationship to the ability of any agency to perform its mission effectively,[50] but it is too often ignored by theorists.

The first criterion seems initially to reflect a different type of concern entirely--that admission of unreliable evidence will result in injustice through an erroneous finding of fact. Upon analysis, however, the dissatisfaction expressed with respect to this criterion also relates to the managerial side of the administrative justice system. As several respondents noted in their comments, there is no real danger that a finding will be based on evidence an ALJ considers unreliable but feels compelled to admit anyway, since the ALJ will simply decline to rely upon such evidence in making findings. Several ALJs who expressed dissatisfaction with the APA standard with respect to this criterion explained in comments the basis for their dissatisfaction. If an ALJ feels compelled to admit unreliable evidence, she also feels compelled to provide the opponent of the unreliable evidence a complete opportunity to demonstrate the unreliability of the evidence through cross-examination and presentation of rebuttal evidence. Thus, ALJ dissatisfaction with the lack of discretion to exclude unreliable evidence provided by the APA standard seems to be premised on potential undue consumption of time.[51]

III. ANALYSIS AND RECOMMENDATIONS

Three general types of evidentiary standards are now used by federal agencies--(1) the FRE "so far as practicable" standard, (2) the wide-open APA standard, and (3) the DOL standard with its permissive reference to the FRE and selective incorporation of some federal rules. In this section, I will evaluate the strengths and weaknesses of each, argue in support of adoption of a standard of the type used by DOL, and suggest other changes in agency practices that offer the promise of allowing ALJs to make evidentiary rulings in a manner that will improve the quality of administrative justice.

The "so far as practicable" Standard

The survey of ALJs identified the major advantages of the

FRE "so far as practicable" standard. ALJs prefer this standard to the open-ended APA standard because they perceive that it accords them both the guidance and the discretion to exclude low quality evidence. This in turn allows them to manage adjudications more effectively with less need to devote valuable hearing time to evidence they consider unreliable.

Adoption of the "so far as practicable" standard has two major disadvantages, however. First, reviewing courts seem not to know what to make of it.[52] Some interpret it to require reversal of an agency if it admits evidence inadmissible in a jury trial unless the agency meets an apparently heavy burden of establishing that it was not "practicable" to follow the FRE in a particular instance. Others seem to indulge in the entering assumption that it is rarely "practicable" for an agency to follow the FRE. Still others apparently consider it reversible error for an agency to exclude evidence made inadmissible by the FRE without explaining why it adhered to the FRE in the circumstances. It is difficult to recommend a putatively mandatory standard that is subject to such a wide range of judicial interpretation.

Second, if the standard is interpreted in a manner that effectively limits the discretion of agencies and ALJs to admit evidence that is inadmissible in a jury trial, the standard makes little sense. It is difficult for agency ALJs to apply the FRE to resolve close evidentiary disputes. Imposition of mandatory constraints on agency discretion to admit evidence serves no conceivable purpose. Moreover, it is inappropriate to limit expert agency decision-makers to consideration only of evidence that can be considered by lay jurors.

The FRE are designed to further two goals--to avoid decisions based on unreliable evidence by precluding decision-makers from being exposed to such evidence and to promote efficiency in the trial process by excluding evidence of such low quality that the cost in the form of trial time required to receive and consider the evidence exceeds substantially the value of the evidence.[53] Thus, for instance, the 33 exceptions to the hearsay rule either instruct a judge to consider the reliability of the evidence directly or to base her ruling on characteristics of the evidence that are believed to function as rough surrogates for reliability.[54] In contrast, FRE 403 provides a basis for excluding evidence that will require more time at trial than its value justifies.[54a] In this section, I will discuss only exclusionary rules, like the hearsay rules, that are designed to further the first goal. I will discuss FRE 403 and the second goal in the next section.[55]

As with any other area of law, application of the FRE presents both easy and hard cases. A set of mandatory exclusionary rules is totally unnecessary to permit ALJs to resolve the easy cases. If an item of proffered evidence is clearly unreliable, an ALJ does not have to be told to exclude the evidence because it is inadmissible under the FRE; she needs only the discretion to exclude it because it is unreliable. The many hard cases are, by definition, difficult for federal judges to resolve--particularly in the context of a trial in which a judge may be called upon to resolve promptly scores of difficult evidentiary controversies based on only a few minutes of argument and thought devoted to each.

The risk that a judge will err in some close cases and exclude items of evidence that are sufficiently reliable and probative to warrant consideration is high. The cost of such errors is also high--remand for further hearings or a decision that is not based on all of the reliable evidence. Of course, we require federal judges to take this risk routinely in jury trials, so there are at least some circumstances when we consider it a risk worth taking. The question then must be asked: is an agency adjudication a context in which this risk is justified?

There are three reasons why it makes little sense to take the risk of erroneous exclusion of reliable evidence through application of highly technical exclusionary rules in the context of agency adjudications. First, the cost of such errors is as great in the agency adjudication context as it is in the trial context--if the ALJ erroneously excludes reliable evidence, the agency must either remand for further proceedings or decide the case on the basis of an incomplete record. Second, the risk of errors of exclusion is greater in the agency adjudication context than in the context of a jury trial. Third, there are good reasons to take this risk in the jury trial context that do not exist in the case of agency adjudications.

Prompt resolution of difficult evidentiary issues under the FRE presents even greater challenges and risks to agency ALJs than to federal trial judges. To resolve close evidentiary questions, a judge must focus specifically and with some care on the issues in the proceeding and on the relationship between a proffered item of evidence and those issues, for most such questions must be answered by reference to the purpose for which the evidence can be considered and its probative value when considered for that purpose.[56] Yet, agency ALJs often have an incomplete understanding of the issues at the time they must rule on the admissibility of evidence. ALJs, unlike federal judges, do not resolve cases subject only to possible appeal. Rather, they issue initial decisions that are, for most purposes, functionally equivalent to recommendations to agency decision-makers.[57] Since the ALJ is not the final decision-maker, she often has an imperfect understanding during the hearing of both the issues the agency ultimately will consider important and the probative value the agency will attach to various types of evidence with respect to those issues.

The extent of an ALJ's understanding of the issues at the time of a hearing depends on the degree of specificity with which Congress has identified those issues in the agency's organic act and the extent to which the agency has increased that specificity by promulgating legislative rules. Far too frequently, Congress declines to establish meaningful statutory standards[58] and the agency declines to issue regulations that create standards sufficient to permit ALJs to be confident that they know the issues in a proceeding or the probative value that the agency will attach to various types of evidence that arguably bear on those issues.[59] As a result, agency ALJs frequently have a less complete understanding of the substantive legal principles that should inform their evidentiary rulings than do trial judges.

The decision to take the risk of erroneous exclusion of evidence in jury trials is based in part on considerations of necessity that have no analogue in administrative adjudications. In a jury trial, there is little choice but to ask trial judges to resolve close evidentiary disputes through application of complicated and detailed exclusionary rules, and thereby to take the risk of a new trial or of a decision that is not based on all reliable evidence. In Dean Calabresi's words, juries are "aresponsible" decision-makers,[60] in the sense that they are not required to explain the bases for their decisions, including particularly the evidentiary bases for their findings of fact. Thus, if we want to preclude juries from basing findings on evidence considered unreliable by judges, we can do so only by precluding their exposure to that evidence in the first place.

The considerations are entirely different in agency adjudications.[61] Agencies and ALJs are required to state the bases for their findings of fact.[62] Their findings are then subject to judicial review under the substantial evidence standard.[63] If an agency finding is based on unreliable evidence, the agency's action is reversed. Thus, there is a mechanism available in agency adjudications independent of rulings on the admissibility of evidence to insure that agency findings are based only on reliable evidence.

The independent mechanism available in agency adjudications offers enormous advantages over the instant evidentiary ruling during a trial that provides the only effective means of insuring that juries do not base findings on unreliable evidence. The on-the-spot resolution of close evidentiary issues during a trial undoubtedly results in many erroneous exclusions of reliable evidence because trial judges have little opportunity to reflect on the reliability of an item of proffered evidence before ruling. The need for instant rulings also requires judges to use the many imperfect surrogates for reliability embedded in the FRE because it is easier to apply objective surrogates rapidly than to evaluate reliability directly. Evidentiary rulings in jury trials also must be made in many cases at such an early stage of the proceeding that judges cannot assess accurately some of the factors, such as incremental probative value, that are important to evidentiary decisions.[64]

By contrast, if agency ALJs defer all close decisions concerning the reliability of proffered evidence by admitting all evidence that might be sufficiently reliable to justify consideration, they can make reliability decisions at a time when their decisions are more likely to be accurate. As they read the record and begin to draft their opinion, they can reflect on the entirety of the evidence submitted and base their reliability determinations on each item of evidence as it relates to other evidence and to the issues as they then understand those issues. Equally important, the agency decision-makers can engage in the same careful process of deciding which evidence is sufficiently reliable to warrant consideration in resolving the issues as they see them. Since a principal role of agencies is to make policy decisions Congress has declined to make,[65] agencies frequently focus on a set of issues and evidence different from the issues and evidence the ALJ believed to be important. Once the agency has completed this process, a reviewing court can perform the important function of insuring that no finding is predicated on unreliable evidence.

Advocates of application of the FRE to agency adjudications seem to ignore completely the major functional differences between the role of the FRE in jury versus non-jury proceedings. While the FRE apply putatively to both types of proceedings, judges do not apply them in the same manner in jury and non-jury cases. Indeed, appellate courts consistently admonish trial judges to resolve all close evidentiary disputes in favor of admission in non-jury cases. The landmark decision on this issue is the Eighth Circuit's oft-cited 1950 opinion in Builders Steel Co. v. Commissioner.[66] The reasoning in that opinion applies a fortiori to the agency adjudication context:

> In the trial of a nonjury case, it is virtually impossible for a trial judge to commit reversible error by receiving incompetent evidence, whether objected to or not. An appellate court will not reverse a judgment in a nonjury case because of the admission of incompetent evidence, unless all of the competent evidence is insufficient to support the judgment or unless it affirmatively appears that the incompetent evidence induced the court to make an affirmative finding which would not otherwise have been made.[67]

* * *

> One who is capable of ruling accurately upon the admissibility of evidence is equally capable of sifting it after it has been received, and, since he will base his findings upon the evidence he regards as competent, material and convincing, he cannot be injured by the presence in the record of evidence which he does not consider competent or material.
>
> If the record on review contains not only all evidence which was clearly admissible, but all evidence of doubtful admissibility, the court which is called upon to review the case can usually make an end of it, whereas if evidence was excluded which that court regards as having been admissible, a new trial or rehearing cannot be avoided.[68]

It seems anomolous for Congress or an agency to purport to require ALJs to exclude evidence they believe to be inadmissible under the FRE when appellate courts uniformly instruct federal trial judges to resolve all close cases in favor of admission in nonjury cases. Each of the factors that cause appellate courts to give this guidance to trial judges applies with at least equal force to agency ALJs. Indeed, there are powerful additional reasons ALJs should resolve all close cases in favor of admission.

Agencies do not merely perform the decisional review function assigned to appellate courts; they make decisions, frequently on the basis of considerations quite different from those that influenced the ALJ. Thus, it is more important that agencies have access to all evidence that even arguably is sufficiently reliable to warrant consideration than it is for appellate courts to have access to such evidence. In addition, agencies, unlike courts, can base findings on evidence inadmissible under the FRE if a reviewing court concurs in the agency's judgement that the evidence is sufficiently reliable.[69] Thus, it seems foolish to instruct ALJs to exclude evidence based on a set of rules that bars a large class of evidence that the agency could use as a basis for action if the evidence ever reached the agency decision-maker. Of course, an agency decision-maker is always free to disregard an item of evidence inadmissible under the FRE if she believes it to be unreliable. Instructing ALJs to exclude all evidence inadmissible under the FRE has the effect, however, only of removing the agency decision-maker's discretion to consider evidence she and a reviewing court believe to be sufficiently reliable to justify consideration.

It is not only difficult, risky, and unnecessary to instruct ALJs to exclude evidence made inadmissible by the FRE, it is inappropriate to ask them to perform this task because agencies should have the discretion to rely on such evidence if it is reliable. The FRE themselves support this proposition.

Most of the FRE, and in particular the elaborate rules governing the admissibility of hearsay, are predicated on the assumption that the issue is whether an item of evidence is suitable for consideration by a lay decision-maker.[70] The FRE also have provisions that deal explicitly with the issue of whether an item of evidence is suitable for consideration by an expert. FRE 703 permits an expert to base an admissible opinion on inadmissible evidence if that evidence is "of a type reasonably relied upon by experts in the . . . field . . . ."[71] The courts have interpreted FRE 703 to permit an expert to base an opinion on inadmissible but reliable hearsay.[72] Further, they have held that the scientific community's view of reliability governs, rather than a court's view.[73] Thus, the trial judge's role is to determine through factual investigation whether an item of inadmissible evidence used as the basis for an expert opinion is considered reliable by other experts in the field. The judge is not to decide whether the evidence meets the judge's threshold of reliability or whether it conforms to the surrogates for reliability selected by the drafters of the FRE to determine whether nonexperts can use an item of evidence as the basis for an opinion or conclusion.

Agency decision-makers are experts, not lay jurors or lay witnesses. As such, the findings and opinions of agency decision-makers should be governed by the same pragmatic standard used both by the courts and by the drafters of the FRE to determine whether an item of evidence is sufficiently reliable to form the basis for an expert opinion. Once that proposition is accepted--and the Supreme Court accepted it in Richardson v. Perales[74]--it makes no sense for Congress or an agency to attempt to restrict an ALJ's discretion to admit evidence solely because that evidence is not admissible in a jury trial. In summary, the "so far as practicable" standard should be abandoned because: (1) courts do not know what it means or how to enforce it; (2) instructing ALJs to exclude evidence based on the standard forces them to undertake a difficult and hazardous task; (3) excluding evidence on the basis that it is inadmissible in a jury trial is totally unnecessary to insure that agencies take actions based only on reliable evidence; and, (4) agencies, like other experts, should be permitted to rely upon classes of evidence broader than those that can be considered by lay jurors.

The APA Standard

The advantages of the wide-open APA standard are apparent from the prior description of the disadvantages of the "so far as practicable" standard. The APA standard does not cause confusion among reviewing courts; nor does it require ALJs to undertake a task that is difficult, risky, unnecessary, and counterproductive. The APA standard alone also has difficulties, however, as the survey of ALJs indicates.

ALJs expressed less satisfaction with the APA standard than with a standard that makes reference to the FRE.[75] That relative dissatisfaction was based primarily on frustration that the APA standard does not provide an adequate tool to permit an ALJ to perform her case management role. ALJs perceive that the APA standard provides no basis for excluding evidence even if it is patently unreliable or its probative value is so low that it does not justify the amount of hearing time it would require. This is a serious disadvantage. The delay and high cost of the administrative process poses a severe threat to the quality of justice available in our modern administrative state.[76] Admission and cross-examination of a large volume of low quality evidence contributes significantly to the extraordinary length and attendant high cost of many agency adjudications.

The APA standard alone authorizes an ALJ to exclude an item of evidence only if it is "irrelevant, immaterial or unduly repetitious."[77] Read literally, this standard confers discretion to exclude very little evidence. The modern threshold for determining relevance and materiality is extremely low.[78] The apparently independent basis for excluding evidence as unduly repetitious may be helpful in extreme circumstances, but it seems to provide authority to exclude evidence that meets the low relevancy threshold only if the evidence is virtually identical to other evidence already in the record.

The inadequacy of the APA standard alone as a case management tool becomes apparent when it is compared with the FRE. Independent of the technical exclusionary rules that are designed to insulate lay jurors from arguably unreliable evidence, the FRE provide federal trial judges a powerful tool to permit them to exercise their case management responsibilities in an effective manner. FRE 403 permits exclusion of relevant and material evidence if the probative value of that evidence is substantially outweighed by any of several counterweights, specifically including "considerations of undue delay."[79]

To illustrate the difference between the APA standard alone and an evidentiary standard that incorporates FRE 403, consider a hypothetical situation that recurs frequently in agency adjudications. A party (perhaps a party with a motive for delay) proffers a voluminous exhibit tangentially related to an issue in the case and based entirely on low quality second and third hand hearsay information. The ALJ is confident that neither she nor the agency will rely on the exhibit for any purpose. She also knows, however, that typical conservative counsel for the opposing parties will insist on cross-examining the witness responsible for the exhibit at length and on presenting similar low quality rebuttal exhibits if the ALJ admits the originally proffered exhibit. Thus, admission of the exhibit will lengthen the proceeding significantly.

The ALJ would like to exclude the exhibit, thereby substantially truncating the hearing and hastening the day when the agency ultimately can decide the case. Yet the APA standard alone provides no clear authority to exclude the exhibit, no matter how low its quality or how much it is likely to prolong the proceeding. The exhibit meets the low modern threshold for determining relevance and materiality and, it is probably not unduly repetitious unless the ALJ already has admitted a similar exhibit. Under the APA standard alone, the ALJ may feel compelled to admit the exhibit. By contrast, FRE 403 provides the ALJ the additional tool she requires to engage in responsible case management in this frequently recurring situation. Even though the exhibit is relevant, she can exclude it under FRE 403 because its probative value is substantially outweighed by considerations of undue delay.

Since the balancing test in FRE 403 is weighted in favor of admission, the ALJ will continue to resolve close cases by admitting a controversial item of evidence, just as federal trial judges now do in non-jury cases. Hence, exercise of the discretion conferred by FRE 403 raises little risk of an agency or court remand because an ALJ erroneously excluded an item of evidence. Appellate courts accord substantial deterrence to trial judge applications of FRE 403.[80] Agencies and reviewing courts should accord analogous deference to ALJ applications of FRE 403 in recognition of the ALJ's greater familiarity with the situation at trial and the difficulty of the ALJ's task in exercising her case management responsibilities. Because of the combination of ALJ resolution of all close cases in favor of admission and agency and court deference to ALJ evidentiary rulings applying FRE 403, authorizing ALJs to apply FRE 403 does not raise the serious and unnecessary risks inherent in instructing ALJs to apply the myriad complicated and technical provisions of the FRE that are designed to control jury trials.[81]

The DOL Standard

The DOL standard[82] seems to eliminate the disadvantages of both the "so far as practicable" standard and the APA standard. It creates no confusion for reviewing courts because its reference to the FRE is permissive rather than mandatory. For the same reason, it does not impose a difficult, risky and counterproductive responsibility on ALJs. At the same time, the DOL regulation provides ALJs a basis for managing the cases that come before them. They have a clear basis to exclude evidence whose incremental contribution to the fact-finding process does not justify the amount of hearing time its admission would require. The DOL regulation incorporates the most powerful tool available to federal trial judges to expedite proceedings and to keep unreliable evidence from cluttering the record, absorbing valuable trial time, and delaying a decision in the case--FRE 403. Judging from the high rate of satisfaction reported by DOL ALJs,[83] the DOL regulation allows ALJs to perform their case management function far more effectively than does the APA standard alone.

On balance, the approach taken by Congress and DOL in the process of adopting an evidentiary regulation to govern agency adjudications seems far preferable to the alternatives now in effect at other agencies. Congress should limit its role in the process of establishing agency evidentiary rules to incorporation of the APA standard. If Congress actually wants to attach special limits on the type of evidence that a particular agency can use as the basis for its findings of fact--and it is hard to identify any good reason for this action[84]--it should do so directly by establishing a special, more demanding definition of substantial evidence applicable to that agency, rather than attempting to further this goal indirectly through the awkward process of limiting the evidence an ALJ can admit.

Agencies also should refrain from imposing on ALJs the straight jacket of the FRE. Instead, agencies should provide as much guidance as possible, including adoption of the weighted balancing test of FRE 403, to enable ALJs to perform their important case management function. Agencies also can assist ALJs materially by announcing in advance of adjudications--preferably through the rulemaking process--the substantive standards the agency intends to apply in resolving various classes of adjudications.[85] All evidentiary rulings must be based on a good understanding of the substantive issues in dispute.

FOOTNOTES

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1. The goals stated are based on the author's interpretation of the debate that preceded passage of the recommendation. The Conference has not adopted this, or any other, set of goals underlying adoption of the recommendation.

2. *See*, *e.g.*, 29 U.S.C. section 160(B) (purporting to mandate use of FRE in National Labor Relations Board adjudications "so far as practicable."

3. FRE 801-805.

4. *See* K. Davis, Administrative Law Treatise §16.5 (1980).

5. The consultant's report has been revised to enhance consistency with the final version of the recommendation and the debate preceding adoption of the recommendation.

6. A substantial majority of federal agencies merely recite or paraphrase the evidentiary provision in the Administrative Procedure Act, 5 U.S.C. section 556(d). That provision neither establishes nor refers to any rules of evidence. *See* text accompanying notes 18 through 23.

7. 29 C.F.R. section 18.44 (Department of Labor).

8. *E.g.*, 29 C.F.R. section 102.29 (National Labor Relations Board); 43 C.F.R. section 4.122 (Department of Interior Board of Contract Appeals).

9. Davis, Hearsay in Administrative Hearings, 32 Geo. Wash. L. Rev. 689 (1964); Davis, The Residuum Rule in Administrative Law, 28 Rocky Mountain L. Rev. 1 (1955); Davis, Evidence Reform: The Administrative Process Leads the Way, 31 Minn. L. Rev. 581 (1950); Davis, An Approach to Problems of Evidence in the Administrative Process, 55 Harv. L. Rev. 364 (1942).

10. Gellhorn, Rules of Evidence and Official Notice in Formal Administrative Hearings, 1971 Duke L. Rev. (1971).

11. 402 U.S. 389 (1971).

12. *E.g.*, Note, The Substantial Evidence Rule in Administrative Proceedings: Restrictions on the Use of Hearsay Since *Richardson v. Perales*, 36 Ark. L. Rev. 102 (1983); Note, Administrative Law--Evidence--Residuum Rule--*Unemployment Compensation Board of Review v. Ceja*, 20 Duq. L. Rev. 343 (1982); Note, Administrative Law--Hearsay Evidence--Uncorroborated Hearsay Evidence Will Not Support a Factual Finding in Unemployment Compensation Proceedings--Ceja, 87 Dick. L. Rev. 193 (1982).

13. *E.g.*, Note, The Good Faith Exception to the Exclusionary Rule: Should It Apply to OSHA Enforcement Proceedings? 9 U. Dayton L. Rev. 95 (1983); Note, The Exclusionary Rule and Its Applicability to OSHA Enforcement Proceedings, 12 U. Balt. L. Rev. 1 (1982).

14. *See* J. Mashaw, C. Goetz, F. Goodman, W. Schwartz, P. Verkuil & M. Carrow, SOCIAL SECURITY HEARINGS AND APPEALS (1978); Pierce, The Choice Between Adjudicating and Rulemaking for Formulating and Implementing Energy Policy, 31 Hastings L.J. 1 (1979).

15. Federal Rules of Evidence, Pub. L. 93-595; 88 Stat. 1926 (1975).

16. Some ALJs "always" rely on the Federal Rules, while other ALJs "never" or "rarely" rely on the Federal Rules. See tables on in text.

17. *E.g.*, NLRB v. Process and Pollution Control Co., 588 F.2d 786 (10th Cir. 1978); Helena Laboratories Corp. v. NLRB, 557 F.2d 1183 (5th Cir. 1977); NLRB v. Addison Shoe Corp., 450 F.2d 115 (8th Cir. 1971). *See also* text at notes 33-35.

18. 5 U.S.C. section 556(d).

19. *See* Sen. Doc. No. 248, 79th Cong., 2d Sess. 30, 208, 270 (1946); Report of the Attorney General's Committee on Administrative Procedure 70-71 (1941). *See also* K. Davis, *supra* note 4, at section 16.4 (1980).

20. *E.g.*, 42 U.S.C. section 7171(G) (Federal Energy Regulatory Commission must comply with APA section 556).

21. 29 U.S.C. section 160(B).

22. *Compare* 39 C.F.R. section 916, *with* 39 C.F.R. section 952

(differing rules of Postal Service).

23. 29 U.S.C. section 160(B).

24. 29 C.F.R. section 2200.72.

25. 43 C.F.R. section 4.122.

26. 49 C.F.R. section 1100.75.

27. 47 C.F.R. section 1.351.

28. 29 C.F.R. section 18.44.

29. SCM v. Xerox Corp., 77 F.R.D. 10 (D. Conn. 1977) (limiting number of days in which parties could present evidence under FRE 403).

30. E.g., FTC v. Cement Institute, 333 U.S. 683, 705-06 (1948); Opp Cotton Mills v. Administrator, 312 U.S. 126, 155 (1941); Evosevich v. Consolidated Coal Co., 789 F.2d 1021 (3d Cir. 1986).

31. E.g., NLRB v. Maywood Do-nut Co., 659 F.2d 108 (9th Cir. 1981); Catholic Medical Center v. NLRB, 589 F.2d 1166 (2d Cir. 1978); NLRB v. Jacob E. Decker & Sons, 569 F.2d 357 (5th Cir. 1978).

32. See Catholic Medical Center v. NLRB, 589 F.2d 1166, 1170.

33. 588 F.2d 786.

34. 557 F.2d 1183.

35. 450 F.2d 115.

36. E.g., NLRB v. Jacob E. Decker & Sons, 569 F.2d 357 (prior felony convictions are admissible if their probative value exceeds their potential for unfair prejudice).

37. E.g., CAB v. Air Transport Ass'n, 201 F. Supp. 318 (D.D.C. 1961). See also K. Davis, supra note 4, at section 16.10.

38. R. Lempert & S. Saltzburg, A MODERN APPROACH TO EVIDENCE 645-651 (2d ed. 1982).

39. ICC v. Baird, 194 U.S. 5 (1904).

40. 218 N.Y. 435, 113 N.E. 507 (1916).

41. 218 N.Y. 435, 440, 113 N.E. 507, 509.

42. 5 U.S.C. section 706(2)(E). See also Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

43. K. Davis, supra note 4, at section 16.6; C. McCormick, EVIDENCE 126 (1954); J. Wigmore, EVIDENCE section 4(b) (1940); Gellhorn, supra note 10.

44. 402 U.S. 389.

45. E.g., K. Davis, supra note 4, at section 16.7.

46. The selection of a sample of ALJs to receive the questionnaire was not scientific. The Administrative Conference had access to a mailing list that included the addresses of only 603 of the 1121 ALJs. The distribution of responses seems representative, however. The respondents from agencies that incorporate or paraphrase the APA evidentiary standard serve at the following agencies: SSA (113), mine safety (5), EPA (4), SEC (4), FLRA (4), DOA (4), ITC (2), FERC (2), FTC (1), FDA (1), DEA (1), NTSB (1), HUD (1), and NRC (1). The respondents from agencies whose evidentiary standard includes a reference to the FRE serve at the following agencies: NLRB (23), DOL (21), FCC (8), ICC (3), DOI (3), OSHRC (3), Coast Guard (3), USPS (2), export administration (1), FMC (1), and SBA (1).

47. Most SSA adjudications are not adversarial; neither the claimant nor the government is represented at the hearing. It is difficult to envision how any set of evidentiary rules could be applied in this type of proceeding. Most claimants, with no knowledge of the rules of evidence, could be expected to experience confusion and frustration when told by an ALJ that some of their evidence had been rejected on the basis of some "technicality" beyond their ken. The few claimants represented by counsel would enjoy a significant advantage, since their evidentiary arguments would be unopposed.

48. In recognition of the difficulty of applying evidentiary rules to nonadversarial hearings involving pro se litigants, many of the SSA ALJs who expressed a preference to adopt an evidentiary standard that included a reference to the FRE commented that such a change could occur only if SSA also adopted an adversarial system in which both the claimant and the government are represented by counsel. Such a change would increase the cost of administering the Social Security Disability system dramatically with little, if any, improvement in the quality of justice provided by that system. See Mathews v. Eldridge, 424 U.S. 319 (1976) (refusing to require counsel at government expense in disability proceedings on the basis that the cost of the added procedural safeguard would exceed its benefits.) See also J. Mashaw, BUREAUCRATIC JUSTICE: MANAGING SOCIAL

SECURITY DISABILITY CLAIMS (1983) (emphasizing the limited extent to which expensive judicially imposed safeguards can improve the quality of a mass justice system in contrast to the substantial improvements potentially available through implementation of less expensive internal quality control mechanisms.) See generally R. Pierce, S. Shapiro, and P. Verkuil, ADMINISTRATIVE LAW AND PROCESS 255-277 (1985).

Because of the unique features of SSA adjudications, the Conference specifically exempted such "non adversarial" proceedings from the scope of Recommendation 86-2.

49. Twenty-one ALJs at DOL and thirty-one ALJs at APA agencies other than SSA responded to the questionnaire.

50. See Pierce, supra note 14; Mashaw, supra note 14.

51. Some respondents also complain that reviewing courts sometimes require explicit discussion even of clearly unreliable evidence. Under the "adequate consideration" doctrine, an ALJ and an agency risk potential remand if they fail to consider explicitly all arguably relevant evidence. See R. Pierce, S. Shapiro & P. Verkuil, supra note 48, at 380-413. Thus, lack of discretion to exclude unreliable evidence also can force an ALJ to devote scarce opinion-writing time to explaining why she chose not to rely on unreliable evidence she felt compelled to admit.

52. See text accompanying notes 28-30. Agencies also experience difficulty attempting to interpret and apply the "so far as practicable" standard. OSHRC has proposed to abandon its use of the standard because it has been unable to define and apply the standard in an acceptable manner. 51 Fed. Reg. 23184, 23190 (June 25, 1986). Unfortunately, OSHRC has proposed to become the first federal agency to adopt the even less appropriate standard of strict application of the FRE. See text accompanying notes 53-70.

53. See M. Graham, Federal Rules of Evidence 82-83 (1981); G. Lilly, An Introduction to the Law of Evidence 3-4 (1978).

54. R. Lempert and S. Saltzburg, supra note 38, at 498-505.

54a. M. Graham, supra note 53, at 82-83.

55. See text accompanying notes 75-83.

56. Evidence of prior crimes, for instance, can be considered only for some purposes (FRE 404 and 609) and only when its probative value for those purposes exceeds its potential for unfair prejudice or undue expenditure of time. See U.S. v. Beechum, 582 F.2d 898 (5th Cir. 1978). More generally, it is

impossible to determine whether an item of proffered evidence is hearsay without first determining the purposes for which it may be used by the decision-maker. See Tribe, Triangulating Hearsay, 87 Harv. L. Rev. 957 (1974).

57. See K. Davis, supra note 4, at section 17.14.

58. See Pierce, The Role of Constitutional and Political Theory in Administrative Law, 64 Texas L. Rev. 469, 472-481 (1986).

59. See Estreicher, Policy Oscillation at the Labor Board: A Plea for Rulemaking, 37 Ad. L. Rev. 163 (1985). For a discussion of the practical problems posed by an agency's failure to specify the issues in advance of an adjudication, see Pierce, supra note 14, at 34-35. See also Robinson, The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform, 118 U. Pa. L. Rev. 485, 524-45 (1970).

60. G. Calabresi and P. Bobbitt, TRAGIC CHOICES 57 (1978).

61. Gellhorn, supra note 10, at 17-18.

62. R. Pierce, S. Shapiro, & P. Verkuil, supra note 48, at section 6.4.3d.

63. Id., at section 7.3.

64. In recognition of this serious problem, appellate courts frequently encourage trial judges to defer ruling on difficult evidentiary issues until late in a trial. E.g., U.S. v. Beechum, 582 F.2d 898.

65. Pierce, supra note 58, at 505-508.

66. 179 F.2d 377 (8th Cir. 1950). Accord Fields Eng. & Equip., Inc. v. Cargill, Inc., 651 F.2d 589, 594 (8th Cir. 1981); Multi-Medical Convalescent and Nursing Center v. NLRB, 550 F.2d 974, 977 (4th Cir. 1977); Northwestern Nat. Casualty Co. v. Global Moving and Storage Inc., 533 F.2d 320, 324 (6th Cir. 1976).

67. 179 F.2d at 379.

68. Id.

69. Richardson v. Perales, 402 U.S. 389 (1971).

70. K. Davis, supra note 4, at section 16.3; Gellhorn, supra note 10, at 17-22.

71. FRE 703.

72. Au Rust Proofing Center, Inc. v. Gulf Oil Corp., 755 F.2d 1231 (7th Cir. 1985); Greenwood Util. Comm. v. Mississippi Power Co., 751 F.2d 1484 (5th Cir. 1985); In re Japanese Electronic Producer's Antitrust Litigation, 723 F.2d 238 (3d Cir. 1983), *rev'd* on other issues *sub nom*. Matsushita Elec. Indus. Corp. *v. Zenith Radio Corp., 106 S*. Ct. 1348 (1986);

73. *E.g.*, Indian Coffee Corp. v. Procter & Gamble Co., 752 F.2d 891 (3d Cir. 1985).

74. 402 U.S. 389.

75. See tables in text.

76. *See* Senate Comm. on Governmental Affairs, Study on Federal Regulation Vol. IV, Delay in the Regulatory Process, S. Doc. No. 95-72, 95th Cong., 1st Sess. (1977). *See also* Pierce, *supra* note 14.

77. 5 U.S.C. section 556(d).

78. *See* FRE 401 and Advisory Committee's Note, 56 F.R.D. 183, 215.

79. *See* FRE 403 and Advisory Committee's Note, 56 F.R.D. 183, 218. *See also* Pierce, Admissibility of Expert Testimony in Hearsay Form, 5 Am. J. Trial Adv. 277, 279-283 (1981); Slough, Relevancy Unraveled, 5 Kan. L. Rev. 1 (1956).

80. *See*, *e.g.*, Stengel v. Belcher, 522 F.2d 438 (6th Cir. 1975).

81. See text accompanying notes 52-74.

82. 29 C.F.R. section 18.44.

83. See table in text.

84. See text accompanying notes 69-74.

85. Agencies vary widely with respect to the extent to which they apprise the ALJ and the parties in advance of the issues they consider important in an adjudicatory proceeding and the types of evidence they consider probative of those issues. At one extreme, NLRB rarely issues rules and frequently changes its policies in adjudicatory disputes with no advance notice. *See* Estreicher, *supra* note 59. *See also* Bernstein, The NLRB's Adjudication Rulemaking Dilemma Under the Administrative Procedure Act, 79 Yale L.J. 571 (1970). By contrast, SSA has materially assisted ALJs by resolving some recurring factual issues by rulemaking, identifying with specificity other factual issues through rulemaking, and

publishing guidelines concerning the relative reliability of various types of evidence when considered in resolving recurring issues. *See*, *e.g.*, Heckler v. Campbell, 461 U.S. 458 (1983) (affirming SSA rule establishing grid system for determining availability of various types of jobs). *See also* 20 C.F.R. sections 404.708-780 (guidelines describing "preferred evidence" and "other evidence" relevant to a variety of recurring issues).

BACKGROUND REPORT FOR RECOMMENDATION 86-3

POINTS ON A CONTINUUM: DISPUTE RESOLUTION PROCEDURES AND THE ADMINISTRATIVE PROCESS

Philip J. Harter

Report to the Administrative Conference of the United States

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Federal Maritime Commission.

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I
INTRODUCTION

Administrative Experimentation.

The Administrative Procedure Act is by and large divided into two relatively distinct parts: notice and comment rulemaking and trial type hearings presided over by an administrative law judge. The provisions governing the former are, at least in their pristine statutory form,[1] remarkably brief considering the leverage provided agencies for controlling private action through their exercise. The latter are positively Byzantine in their complexity. As opposed to defining even the skeleton of the full range of procedures that are actually used, the two are the endpoints of a continuum of procedures[2] ranging from the flexibility of notice and comment rulemaking to the formal rigidity of a trial type hearing under the APA.

Perhaps unfortunately, the APA itself does not address the great bulk of administrative procedure that lies between its extremes,[3] other than by providing guidance through analogy and adaptation of the specified structures. On the other hand, the lack of codification encourages experimentation with new procedures to meet new needs. Moreover, because the APA itself does not address the requirements of the modern administrative state, Congress has taken to including

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1. The legislative history of the rulemaking provisions of the APA reveal a Congressional intent that far more elaborate procedures would be used for developing any rule with substantial impact. See, Harter, Negotiating Regulations: A Cure for Malaise, 71 Geo. L. J. 1, 9-10 (1982). While more was expected, the Act did not impose the additional procedures on agencies. Rather, they were simply expected to follow suit. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978). Through creative statutory interpretation and the "management" of the administrative process, courts have nonetheless developed the "hybrid" rulemaking procedures to address the need for resolving complex factual questions well beyond customary agency expertise. DeLong, Informal Rulemaking and the Integration of Law and Policy, 65 Va. L. R. 257 (1979).

2. Notice and comment rulemaking is not really the lower bound of administrative procedure, of course, since it has some structure and many decisions are made without any specified process. Applications are reviewed and stamps sold with very little formality short of resolving a dispute over a decision made initially by a government official.

3. In contrast with the APA, the Model State Administrative Procedure Act identifies three types of adjudicatory procedures to be used in appropriate cases: formal (§§ 4-201 to 4-221); conference (§§ 4-401 to 4-403); and summary (§§ 4-501 to 4-506).

   Moreover, Federal agencies actually use a broad variety of adjudicatory procedures for resolving contested issues. Verkuil, A Study of Informal Adjudication Procedures, 43 U. Chi. L. Rev. 739 (1976). Thus, while the APA-mandated procedures are complex, the Federal adjudicatory apparatus can be responsive to a host of needs.

sometimes elaborate procedures in substantive statutes instead of relying on the APA to develop a coherent general administrative process.[4] As a result, new forms of administrative procedure crop up -- through ad hoc use by agencies, through ad hoc statutory prescription, and through the journals.

While the experimentation and evolution are clearly beneficial, they do have their costs: the new forms sometimes clash with established precepts.[5] That can, of course, mean either the old should adapt to the new[6] or that the new is not living up to expectations and should be changed before further use.[7] Also, because of their ad hoc nature, they sometimes take a considerable time to become accepted and hence widely used even when proven.

We appear to be in the midst of such a process with respect to the use of "alternative means of dispute resolution" in the administrative process -- procedures that are not recognized by the APA but which appear to be useful supplements to the traditional administrative processes.

Interest in Dispute Resolution.

For at least the past decade[8] and particularly the last five years, there has been an extraordinary interest in "alternative" ways of settling disputes -- alternative, that is, to the courts and formal litigation. That interest has spanned the gamut of disputes,[9] from neighborhood justice centers[10] that work to resolve pesky controversies from barking dogs and trash in alleys, to more serious social infractions, to major corporate matters.[11] The Chief Justice of the United States has been an outspoken proponent of the use of extra judicial means of resolving matters that would otherwise end up in the courts.[12] The Federal Rules of Civil Procedure were recently amended to encourage the use of a range of means short of actual trial for settling controversies once in the courts.[13]

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[4] Elliott, The Dis-Integration of Administrative Law, 92 Yale L.J. 1523 (1985).

[5] Witness, for example, the consternation of the courts in the early seventies when directed by several statutes to review notice and comment rulemaking on the basis of the "substantial evidence" test normally reserved for trial type hearings. Industrial Union Department, AFL-CIO v. Hodgson, 499 F.2d 467 (D.C. Cir. 1974).

[6] Courts seem fully comfortable with the notion of reviewing the factual basis of rulemaking more intensely -- akin to that of the substantial evidence test -- under the "hard look" doctrine that grew up contemporaneously if not as a result of the misfit statutory directions. Ass'n of Data Processing v. Board of Governors, 745 F.2d 677 (D.C. Cir. 1984). Both were responding to a perceived need to force agencies into developing the factual bases of rules built on highly technical or demographic data.

[7] For example, the "offeror" provision of the original Consumer Product Safety Act is one such failed notion that was discarded, although it may have had as much to do with its administration as its concept. See Harter, supra note 1, at 60-63.

[8] The influential Pound Conference was held in 1976. It built on the growing interest in dispute resolution and planted it firmly in the legal agenda. Professor Frank E. A. Sander's paper that was delivered at the Conference served as an influential introduction and benchmark to the area. Sander, The Variety of Dispute Resolution, 70 F.R.D. 111 (1976).

[9] For a general tour of the use so far, see Goldberg, Green and Sander, Dispute Resolution (1985).

The literature,[14] legal and otherwise, has also included a vast discussion of alternative means of dispute resolution, such as arbitration, factfinding, and mediation. While very few of these techniques are actually new, their use has been proliferating into areas in which they were previously unknown. We are, therefore, gaining insights into the use of these forms of making decisions in new settings.

It is not surprising, therefore, that they have been used somewhat in the administrative process: Given their promise and use in the judicial setting, it is only logical that they may also address real needs of the administrative process. And, indeed, that has been the case. Some of these dispute resolution techniques have demonstrated their utility to administrative agencies.[15] But, because of the peculiar requirements of the administrative process, in other instances the fit is not entirely comfortable. And, in some instances their use is likely inappropriate.

No particular theory has developed as to what their structure should be,[16]

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10. McGillis and Mullen, Neighborhood Justice Centers (U.S. Dept. Justice 1977); Cook, Roehl, & Sheppard Neighborhood Justice Centers Field Test (U.S. Dept. Justice 1980).

11. Green, Marks, and Olson, Settling Large Case Litigation: An Alternative Approach, 11 Loy. L.A. L. Rev. 493 (1978); the Center for Public Resources has been a major proponent of the use of means other than litigation, particularly the mini-trial, for resolving corporate disputes.

12. Address by Chief Justice Burger, American Bar Association Midyear Meeting (Jan. 24, 1982) reprinted in Burger, Isn't There a Better Way?, 68 A.B.A.J. 274 (1982).

13. F.R.Civ.P 16(c).

14. Breger, The Justice Conundrum, 28 Vill. L. Rev.923 (1983); Sander, Mediation: A Select Bibliography (ABA Special Committee on Dispute Resolution 1984); Bingham, Vaughn, & Gleason, Environmental Conflict Resolution (Conservation Foundation 1980); U.S. Dept. of Justice, Nat'l Criminal Justice Research Service, Dispute Resolution: Techniques and Applications (1985), Alternative Dispute Resolution Program Evaluation; Levin & DeSantis, Mediation: An Annotated Bibliography (1978).

15. See, ACUS Recommendations 82-4 and 85-5.

16. As will become clear, Judge Friendly's observation in the early days of hybrid rulemaking that "One would almost think there had been a conscious

(continued...)

how they should be used, how they relate to the traditional processes, what sort of judicial review is appropriate, and what their advantages and disadvantages are. The full range of ADR techniques can potentially make a significant contribution to administrative procedure by providing additional means of addressing needs within the endpoints of the procedures specified in the APA itself. Indeed, the adaptation and more widespread use of the ADR processes that are proving successful on the civil side may well offer a solution to some of the more pressing problems of the administrative process. That acceptance will be facilitated by familiarity with the use of the ADR processes outside of the administrative process; a familiarity with their use so far in it; and, some understanding of how they fit within the continuum and relate to other needs of the administrative process.[17]

This report is an initial step in that direction.[18]

Contested Issues.

The focus of the report is on the use of non-APA procedures that may be used to resolve disputed issues, as opposed to making administrative decisions in the first instance. These procedures may be employed directly by the agency itself, or they may be used by a private organization under the supervision or some other close relationship to an agency, generally under circumstances in which the agency itself would hear and resolve the issue were it not for the private body. The "issues" that are the subject of this report need not be sufficiently specific or narrow that they must be resolved in an adjudicatory proceeding, although certainly most will. It does mean that some potential disagreement has arisen that needs to be resolved. The need to resolve the matter is what is important from the perspective of this report, not the context in which the need arises. It could be as part of any form of administrative process -- rulemaking, adjudication, permitting, inspections, procurement, or in programs with an intimate connection to an agency but outside of the agency's

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16.(...continued)
effort never to use the same phraseology twice," *Associated Industries of New York, Inc. v. Department of Labor*, 487 F.2d 342, 345 n.2 (2d Cir. 1973), applies with full vigor at this stage of the use of arbitration in the administrative process.

[17] Edelman, *Institutionalizing Dispute Resolution Alternatives*, 9 Jus. Sys. J. 134 (1984); Harter, *Dispute Resolution and Administrative Law: The History, Needs, and Future of a Complex Relationship*, 29 Vill. L. Rev. 1393, 1417-1419 (1984).

[18] This report is a survey of the variety of techniques other than those mentioned in the APA itself that are used to make administrative decisions. It is a survey and not a comprehensive analysis. It is designed to review the structure of the new processes and to highlight the legal issues involved in their use as well as provide the basis for further use and analysis. The report is largely based on legal materials. In particular, very little empirical research has been conducted to determine how well the programs have functioned in practice. Before they are institutionalized on any broad basis, that research should clearly be done.

direct purview.[19] The process to be employed may be more a function of the nature of the issue to be resolved than of the proceeding to which it is related.[20]

II
OVERVIEW OF THE ALTERNATIVES

The "alternative" of alternative means of dispute resolution does not necessarily mean "instead of something else".[21] Rather, they are different types of procedures that are used for making decisions, usually for resolving some sort of contested issue. Traditional processes, such as litigation itself, are themselves among the alternatives. Thus, the term alternative means of dispute resolution refers to the entire spectrum of techniques for resolving issues. Like other forms of decision making, each has its benefits and its weaknesses, and is more appropriately used in some situations than in others. Moreover, they are often used in conjunction with one another. And, like rulemaking and adjudication under the APA, they are more distinct conceptually than practically: they fade one into another.

Although there are a number of variations on the themes,[22] the major types of ADR techniques are arbitration, med-arb, factfinding, mini-trial, mediation, facilitation, convening, conciliation, and negotiation. The list is arranged in order of the **decreasing** involvement of a third party (no matter how many parties there may be to the controversy), generally referred to as the "neutral."[23]

Arbitration.

Arbitration is closely akin to adjudication in that the neutral decides the matter after reviewing evidence and hearing argument from the parties. It has been widely used for decades in labor relations and in resolving commercial disputes. It ranges in formality from very nearly that of a court to virtually without structure; the arbitrator may be called upon to apply existing law or to reach "justice under the circumstances."

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19. For example, the stock exchanges have procedures to resolve disputes concerning their members. These procedures, if not the decisions in individual cases, operate under the oversight of the Securities and Exchange Commission. See Appendix III.

20. See, Robinson, The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform, 11 U. Pa. L. Rev. 485 (1970).

21. The reference in the text above at notes 8-9 that the interest in "alternatives" to litigation is fairly common, however. The reference, therefore, is somewhat ambiguous, sometimes meaning instead of litigation, and sometimes meaning the full range of dispute resolution techniques including litigation.

22. See generally, Goldberg, Green, and Sander, supra note 9.

23. While, of course, the third party is not always neutral and may sometimes have a very real interest in the outcome, in general the third party is rigorously neutral with respect to the parties and subject matter.

The arbitration may be binding in that the arbitrator's decision ends the controversy, either by agreement of the parties or by some rule of law.[24] It may be advisory or "nonbinding" in that the parties are not bound by the decision; they are expected to consider it seriously, however. Many jurisdictions have established "court-annexed arbitration" in which certain categories of cases, frequently those involving less than a specified level of damages, are either directly referred to arbitration or the litigants are encouraged to proceed to arbitration before trying the case in court. Generally, a dissatisfied party is entitled to a trial de novo although a penalty is sometimes imposed, such as paying the other party's costs, if the requesting party does not better its position in the trial. Interest arbitration is where the neutral decides on the "ordering" among the parties; that is, it determines the relationship of the parties and their interests inter se.[25] Grievance arbitration, on the other hand, is to resolve "rights" under existing agreements or other forms of social ordering. Last offer arbitration, made familiar by the baseball rules, is where the arbitrator's decision is limited to choosing from the last offers made by the parties.

Med-Arb.

"Med-arb" is, as the name itself implies, a hybrid between mediation and arbitration. In it, the neutral first serves as a mediator in attempting to bring about a settlement among the parties and then decides the issues remaining unresolved after the mediated negotiations.[26] Thus, following the mediation, the neutral becomes an arbitrator. Sometimes the arbitration is binding and resolves the issues, but in others the neutral prepares a report analyzing the positions and needs of the parties and recommends a resolution.

Med-arb is to a degree an institutionalization of the common practice of judges' and arbitrators' pushing on parties for a settlement before the hearing or after the hearing but before the decision.[27] In that case, however, the mediation is an adjunct of the main task of judging, and it clearly carries the stick of coercion, whereas in med-arb as usually referred to the emphasis is on the mediation with the arbitration being used as the secondary process.

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[24] For a "lexicon" of ADR terms, see U.S. Department of Justice, Office of Legal Policy's Federal Justice Research Program, Paths to Justice: Major Public Policy Issues of Dispute Resolution (Report of the Ad Hoc Panel on Dispute Resolution and Public Policy prepared by the National Institute for Dispute Resolution) (1984) at 36.

[25] Perritt, "And the Whole Earth was of One Language" -- A Broad View of Dispute Resolution, 29 Vill. L. Rev. 1221, 1229 (1983-4).

Perhaps an "interest" dispute is best characterized by an example. Professor Perritt cites one provided by Dean Hazard:

> It is the type of dispute one gets into say, with one's friend, when you ask: Shall we go to the game or shall we stay at home and watch television? This kind of dispute requires a settlement procedure of some kind, but it is not the kind of dispute that is [suited for the courts].

[26] For an example of a med-arb involving a dispute over how much various local jurisdictions should pay for a regional sewage disposal plant, see Susskind, Court Appointed Masters as Mediators, 1 Negotiation J. 295 (1985).

Unless the parties themselves ask the neutral to render a decision after an impasse is reached, the process is controversial among mediators. The two processes rely on different cultures and different relationships between the neutral and the parties. Mediation requires an exploration of what the parties actually need and are willing to settle for whereas arbitration remains adversarial so that a party may be reluctant to reveal what is acceptable for fear that it would be cut down further in the decision.[28] Oftentimes, especially in labor cases, however, the parties will desire the resolution of the controversy and ask the mediator to arbitrate the remaining issues. In fact, in instances in which some resolution is important so the parties agree before negotiations begin to some sort of med-arb process, the fact that the issues will be arbitrated if no agreement is reached serves as a deadline and powerful incentive for the parties themselves to reach a decision so that the "arb" part of the process often remains unused.[29]

Factfinding.

Many controversies, particularly those that must be resolved by regulatory agencies, turn on enormously complex factual issues. They may be of the highest-tech -- "on the frontiers of scientific knowledge" as the courts have said[30] -- or require predictions of difficult economic developments, or the compilation of demographic issues, or the facts of an industrial dispute. In these cases, the policy or ultimate judgment on the matter cannot be decided until the facts are developed in a relatively authoritative way. Once they are, the parties may then negotiate a settlement, further proceedings may be held, more research may be needed, or the facts may sufficiently drive the outcome so that very little will remain to be done since, for practical purposes, the issue has been resolved.

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[27] Fuller, Collective Bargaining and the Arbitrator, excerpted in Goldberg, Green, and Sander, supra note 9, at 247.

The Merit Systems Protection Board has established this procedure. See, text at note 595.

[28] "The consensus among mediators appears to confirm that the trust and candor required in mediation are unlikely to exist if the participants know the mediator may be formulating an opinion or recommendation that will be communicated to a judge or tribunal." Folberg and Taylor, Mediation at 277.

[29] Med-arb as a dispute settling technique works, and works well. We have been involved in med-arb in such diverse fields as nursing, newspapers, longshore, public utilities, saloons, teamsters, and teachers, as well as in commercial disputes. Of the literally hundreds of issues involved in such cases, less than a dozen had to be finally arbitrated by the med-arbitrator. The parties, with his aid, successfully negotiated all the rest. Kagel, Comment, excerpted in Goldberg, Green, and Sander, supra note 9, at 264, 265-6.

[30] Industrial Union Dept., AFL-CIO v. Hodgson, 499 F.2d 467, 474 (D.C. Cir. 1974).

A "factfinding" proceeding may be appropriate for these issues. Such a proceeding generally entails the appointment of a person or group of people with technical expertise in the subject matter to assay the situation and prepare a report establishing the "facts" of the question entrusted. The factfinder is not asked to resolve the entire issue, only to establish the underlying facts. The matter itself will be determined in another forum -- either by the parties or in some other proceeding. The procedures used for making the determination range from the highly informal to close to a trial.[31]

The factfinder in labor disputes may be someone with familiarity of the industry but certainly someone familiar with labor relations generally; it may also be someone who is widely respected by both sides, so the report will be given credence beyond the purely factual -- objectively determinable -- issues. Factfinding proceedings are, of course, commonly used by administrative agencies, although they frequently are in the form of advisory committees.[32]

Minitrial.

A "minitrial" generally follows the exchange of the parties' key documents and other factual materials.[33] In the minitrial itself, the lawyers for each party are given a relatively short period -- ranging from several hours to several days -- to make their best case. They will sometimes call witnesses but generally they argue what the evidence that has been developed shows and the legal conclusions that would flow from the issues presented. These presentations are made to representatives of the parties who have the authority to settle the controversy and a neutral third party.[34] When the arguments are concluded the representatives then meet to negotiate an agreement.

The process is designed so the executives can view their own case in perspective -- its strengths and weaknesses against those of the other party. The neutral may be called upon to render his or her opinion as to how a court or jury would decide if the matter were submitted for a court's decision; the parties may also ask the neutral for more limited advice. The neutral is, therefore, more an "agent of reality" than an arbitrator. As such, his or her report would potentially change the bargaining position of the parties, and hence they may have an incentive to settle before the report is issued. Or, the report may also convince a party that its case is not as strong as originally thought and hence that a settlement may be the advisable route. The function of the minitrial is to convert what could be a complex, protracted legal battle into a business decision to be made by the executives of the parties.

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[31] For an example of a relatively formal proceeding, see Shapiro, Scientific Issues and the Function of Hearing Procedures: An Evaluation of FDA's Public Board of Inquiry, Report to the Administrative Conference of the United States (1985).

[32] See, e.g. Chronic Hazards Advisory Panel, 15 U.S.C. § 2078; Air Quality Advisory Board and Advisory Committees, Sec. 117, Clean Air Act; Federal Insecticide, Fungicide and Rodenticide Act, 7 USC § 136d(a); the Food and Drug Administration has used panels of the National Academy of Sciences/National Research Council to review the efficacy of drugs, see Stewart, Regulation, Innovation, and Administrative Law: A Conceptual Framework, 69 Cal. L. Rev. 1256, 1354-1359 (1981).

[33] For a discussion of mini-trials in general, see Green, Marks, and Olson, supra, note 11.

[34] A neutral third party is not always used, however. The NASA minitrial did not, for example. See text at note 345.

Mediation.

A mediator is a neutral third party who assists the parties in negotiating an agreement. Mediation is simply a negotiation involving a mediator. The mediator has no independent authority and does not render a decision. Any decision that is made is made by the parties themselves. As one mediator with diverse experience has said, "People pay attention to the mediator for the same reason they do to a civilian directing traffic around an accident -- it helps the process."

The mediator may be quite active in that endeavor, however. He or she will usually help the parties frame the issues, analyze what their actual needs are, and what the other side needs; an important part of that process is also deflating more ambitious assertions and desires when there is little chance of their being achieved. He or she will likely offer suggestions for possible ways of settling the issues and draft materials for the consideration of the negotiations. Some of the suggestions for those ideas may, of course, come from the parties themselves but they will be communicated in a way that will not lock a party into an idea that does not fly; in Washington-speak, the mediator provides the parties with the basis for a "plausible denial". The mediator may also need to communicate to the parties what is likely to happen if an agreement is not reached.[35] In the current vernacular, the mediator will help the parties define their "BATNA's".[36]

The mediator may meet privately with the parties and shuttle back and forth. This is frequently helpful in bounding the issues sufficiently that the parties can address them directly in a meeting. Without that prior definition, the parties may find the risk of direct discussion too great from a political standpoint within their constituencies. Moreover, the shuttling can save valuable time by reducing the need for more direct, face-to-face meetings which are always difficult to schedule among senior representatives. The mediator can deflect attention from the negotiators by being the spokesperson to those not engaged in the discussions. Importantly, the mediator also serves as the proponent of the process itself and can help keep discussions on track and moving.

Facilitating.

A facilitator also works "to help a group of individuals or parties with divergent views reach a goal or complete a task to the mutual satisfaction of the participants."[37] The terms "facilitator" and "mediator" are often used interchangeably. Although the two are close in meaning, they are distinct. A facilitator generally runs meetings and coordinates the negotiations during a meeting but does not become as involved in the substantive issues as does a mediator when working with the parties.[38] Thus, a mediator is also a facilitator but not the other way around.

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[35] A relatively common example in public disputes is that one side may ultimately win the issue, but the other will be successful in delaying it. That state of affairs may not be satisfactory to either side so both may wish to resolve their differences through agreement.

As a result, it is sometimes said that one of a mediator's functions is to carry threats back and forth among the parties.

[36] BATNA stands for best alternative to a negotiated agreement. The term is from Fisher and Ury, Getting to Yes.

Convening.

A "convenor" is a neutral who helps identify those who are interested in and affected by a particular issue and indeed what the issues in controversy are.[39] Thus, the convenor's first task is to conduct a "feasibility analysis" or "conflict assessment" as to whether direct negotiations among the parties would be a recommended way to resolve the issues. If they would, the convenor brings the parties together to negotiate or otherwise reach some sort of decision. The convenor's task ends when the parties are assembled, although of course the same person will frequently then serve as the mediator or facilitator.[40]

Conciliation.

A conciliator works to lower tensions, improve communications, and defuse a tense situation. "Conciliation is frequently used in volatile conflicts and in disputes where the parties are unable, unwilling, or unprepared to come to the table to negotiate their differences."[41]

Negotiation.

Negotiation is simply -- nothing more nor less -- communication between people in an effort to reach an agreement. Negotiations clearly happen all the time. As the introduction to the section on negotiation of a leading book says, "We negotiate with our friends about where to eat dinner, with our spouses about who will do the household chores, with our children about what time they will go to bed."[42] We also negotiate settlements to controversies large and small. Indeed, we negotiate agreements of all sorts.

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[37] Paths to Justice, supra note 24, at 37.

[38] Since it is often confused, it bears repeating that a mediator is not an arbitrator and does not decide substantive issues. Rather, the mediator's substantive involvement is through exploring the issues with the parties in an effort to illuminate potential avenues for agreement.

[39] See, ACUS Recommendation 82-4, Paragraphs 3-5; Harter, Negotiating Regulations, supra note 1, at 67-82.

[40] The convenor will have developed an understanding of the issues and a trust among the parties, and hence it is usually far easier to use the same person as the convenor and mediator or facilitator. Harter, supra note 1 at 77-79.

[41] Paths to Justice, supra note 24, at 36-37.

Sometimes the term "negotiation" carries a perverse connotation, one of "selling out" or compromising one's integrity. It certainly does not necessarily mean horse trading, log rolling, nor other unpleasant images that conjure up parties' exercising raw power or making inappropriate compromises. The negotiations may be totally principled and based on the substantive evidence. The scientific process of peer review is a form of negotiation in which the various "parties" analyze the situation, raise issues, and attempt to reach a decision on a matter.

Negotiation is such a pervasive means of "dispute resolution" that it is sometimes overlooked as such. Since the vast majority of cases[43] and issues are settled, it is the lifeblood of the administrative process. Many of the procedures developed by agencies to "resolve disputes" are actually ways to further and stimulate negotiated settlements.

III
ADMINISTRATIVE ARBITRATION

Arbitration is a powerful, widely used dispute resolution technique. For example, the American Arbitration Association has over 60,000 arbitrators on its rosters[44] and more than 45,000 matters are referred to it annually for resolution.[45] Its use has been endorsed and supported by the U.S. Arbitration Act[46] which directs courts to enforce arbitration agreements and their resulting awards. The Uniform Arbitration Act, which forms the basis for legislation in more than half the states, establishes a similar provision for state law. Court annexed arbitration is growing in popularity and currently at least 16 states employ some sort of arbitration program as an adjunct to the courts.[47]

Because arbitration results in a decision that is imposed on the parties, its use is particularly appropriate for resolving "distributional" disputes in which a better bargain for one party means less for the other.[48] Reaching an agreement through direct negotiation is particularly difficult in those situations. Arbitration frequently serves as a stimulus to settle, however, since parties are forced to prepare their cases for presentation to the arbitrator, and they will also have to discount the potential of an adverse decision. Hence, like preparing for trial, the potential of an arbitral award will itself change the parties' BATNA. Similarly, the parties can agree to submit their dispute to arbitration but not be bound by the arbitrator's decision. In that case, the award will serve as the basis for further negotiation.

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[42] Goldberg, Green, and Sander, supra note 9, at 19.

[43] Galanter, Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About our Allegedly Contentious and Litigious Society, 31 UCLA L. Rev. 4 (1983).

[44] Telephone interview with Irene Conway, American Arbitration Association.

[45] Telephone interview with Earl Baderschneider, American Arbitration Association.

[46] 9 U.S.C. § 1 et seq.

[47] Dispute Resolution Forum (Aug. 1985) at 2.

[48] Schelling, The Strategy of Conflict, (1960) at 21.

Voluntary versus Mandatory.

There are essentially three types of arbitration and, since the relationship between the parties and the process itself may vary one from another, it is important to keep the distinctions in mind.

The first two types are voluntary, in which the parties agree to submit the dispute to arbitration. In the first, the agreement is made **before** any dispute arises. The agreement will typically be made in a contract which provides that any dispute arising under it will be submitted to arbitration. The provisions of the arbitration may then be set out. The second form is where the parties agree to submit a dispute that has arisen to arbitration instead of using some other process, such as litigation, for resolving it.[49] Although the two are different for some purposes, for the most part they are similar in their effect on the nature of the arbitration process. One major difference, however, is that a party that entered into a pre-dispute agreement to arbitration may change its mind once the dispute arises and seek to use some other process once confronted with the actual prospect of an arbitration.[50] Under such a situation, the parties may not be fully cooperative with each other in designing a system, and the coercion of the courts in enforcing an agreement to arbitrate may be needed.

The third type is where the process is imposed on the parties: it is the only forum available for resolving the matter, at least in the first instance. Mandatory court annexed arbitration is such an example. In these cases, the parties are generally not as free, if indeed at all, to define the process that will be used.

Nature of Arbitration.

Arbitration has no set, definite process, and indeed that is one of its main attractions. It is an inherently flexible procedure. Common threads run through most arbitration programs in the private sector, however:

Private Neutral. A private individual serves as the arbitrator. That is, the arbitrator generally does not serve in any official, governmental role, although there is nothing to prevent the arbitrator from being a government official absent any conflict of interest.

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[49] There is a perception among some who are familiar with corporate dispute resolution that the vast majority of arbitrations are pursuant to pre-dispute agreements. Parties appear to be much more reluctant to submit an existing dispute to arbitration, but rather tend to favor litigation instead. Testimony of Michael F. Hollering, General Counsel of American Arbitration, at ACUS Hearings on Agency Use of Alternative Dispute Resolution by Administrative Agencies, May 2, 1986. Conversation with Jonathan Marks, President, EnDispute, Inc.

[50] See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 105 S.Ct. 3346 (1985); Hergel and Salpeter, Alternative Dispute Resolution May Have Limits, Legal Times (Dec. 23/30 1985) at 9.

Parties Choose Arbitrator. The parties are usually able to select the arbitrator. This enables them to choose someone in whom they have confidence. In some instances it is important that they can select someone who has technical expertise in the subject matter of the dispute. That enables the parties to get right to the merits of the dispute, as opposed to having to educate a generalist judge with sufficient background so the matter can be put in perspective. It also enables the arbitrator to exercise a professional judgment based on experience and technical insight instead of solely on a "record" generated by the parties.

The parties themselves may identify an appropriate person or may select from a list tendered to them by an organization such as the American Arbitration Association. That choice may result from the parties' ranking those on the list and the person with the highest rank being selected, or each party may be permitted to strike a name, so that anyone not stricken could serve. If the parties are not permitted to choose, as is customary in the court annexed arbitration programs, a panel of three arbitrators often serves and a decision is made by majority vote. The arbitration in such programs is customarily nonbinding.

Parties Can Select the Norm. The parties can decide what standard the arbitrator will apply. It may be the law of a particular jurisdiction, the rules of some organization, or the ethos of the milieu in which the dispute arose. The norm may also be, and frequently is, the arbitrator's "own brand of justice."[51] If the arbitration program is imposed on the parties, the arbitrator will customarily apply the prevailing law or other established norm of the organization imposing the requirement.

Flexible Procedure. Since arbitration is a private dispute resolution process, the parties themselves can design its procedures. They can range from a virtually total emulation of a court process to the most informal and ad hoc. In some instances, full discovery is permitted and enforced on pain of default. In other cases major documents or other evidence on which a party will rely, are exchanged prior to hearing and in others nothing happens before the hearing. Organizations such as the AAA and the National Academy of Conciliators publish rules that are designed to govern the arbitration proceedings in particular substantive areas;[52] they can serve as the "default" rules that will apply unless modified by agreement of the parties. Because it is not a public process, the proceedings and the result can be kept private and confidential.

The common denominator in the process is that, unless they settle,[53] the parties submit evidence and argument to the arbitrator who makes the decision. As a result of the flexible procedure and the fact that the parties can select the arbitrator, the process can be conducted quite expeditiously should they wish, in terms of the time from when the dispute arises to the hearing, the length of the hearing itself, and the time from the close of the hearing to the decision. The parties can determine the trade off between the formality they desire and the need for expedition.

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[51] Jones, His Own Brand of Industrial Justice: The Stalking Horse of Judicial Review of Labor Arbitration, 30 UCLA L. Rev. 881 (1983).

[52] See, PBGC, FIFRA in App. II.

[53] It appears from preliminary research that many fewer cases that are submitted to arbitration settle as compared to those that go to trial. Whereas many do settle on the eve of the hearing, perhaps only half as many do so as are settled prior to a trial. This is perhaps surprising, and certainly something that needs to be borne in mind when considering institutionalizing arbitration on a broad scale.

While certainly one of the hallmarks and putative benefits of arbitration is its reduced transactions cost in terms of time and resources, that is not always the case. In some instances the arbitration will look for all the world precisely like a trial with a full complement of discovery, sworn witnesses, briefs, and so on.[54] Even then, the process may still be more expeditious than a court since presumably the hearing can be scheduled more rapidly than a judicial calendar would usually permit. But, before embracing arbitration as a means for resolving a dispute the nature of the arbitration process that is contemplated must also be considered to ensure that the desired benefits will actually materialize.

Award. Typically, the decision in an arbitration is only an award: a final result, without elaboration on the facts found or the resolution of the individual issues presented.[55] Sometimes, of course, the decision is supported by a brief recitation of the facts and conclusions.

Finality. One of the primary benefits attributed to traditional arbitration is its finality. Once an award is made it may be subjected to only limited additional review, in court or otherwise.[56] As one leading commentator has said:

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[54] Letter of April 25, 1986 from Chief Administrative Law Judge Naham Litt to Charles Pou; testimony of Stanley Johnson at ACUS hearings, supra note 49.

[55] Goldberg, A Lawyer's Guide to Commercial Arbitration (1979) at 62, 66.

[56] The provision of the U.S. Arbitration Act pertaining to judicial review is extremely limited:

> In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration --
>
> > (a) Where the award was procured by corruption, fraud, or undue means.
> >
> > (b) Where there was evident partiality or corruption in the arbitrators, or either of them.
> >
> > (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
> >
> > (d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(continued...)

> The essence of the law of arbitration is that the scope of judicial review of arbitration awards is very limited. When the arbitrators are properly selected, conduct an orderly hearing at which all parties have a fair chance to present their proofs and render an intelligible award within the scope of their authority, the courts will confirm and enforce the award.[57]

Or, as another explained:

> The courts will not review the merits of the award and confirmation will not be denied, nor will vacatur be granted, upon a showing of error of law or fact on the part of the arbitrators. The court's inquiry is confined to determining whether the award falls within the authority of the arbitrators, whether in form it reflects the honest decision of the arbitrators and whether the hearing generally comported with accepted standards of due process.[58]

The relationship between courts and arbitration is itself a bit complex and evolving,[59] but its essence is that it is very limited.

Quality Control. The quality control in arbitration -- the reason people use it and have confidence in it -- is the ability to choose the arbitrator and the minimal rules under which the process operates. They obtain in return, an expeditious decision[60] that is within the bounds of acceptability.

But, it is likely that the arbitration proceeding will be more abbreviated than a trial and that some of the judicial procedures designed to ensure ac-

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56.(...continued)

> (e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

9 U.S.C. §10.

[57] Goldberg, A Lawyers Guide to Arbitration (2d Ed. ALI 1983) p. 61.

[58] Kreindler, Arbitration Practice Under Federal Law, 18 Forum 348, 357 (1983). And see, 9 U.S.C. § 10, 11.

[59] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc. 105 S. Ct. 3346 (1985); AT&T Technologies, Inc. v. Communication Workers of America, 106 S. Ct. 1415 (1986); Dean Witter Reynolds Inc. v. Byrd, 105 S. Ct. 1238 (1985).

[60] The often cited major advantages of arbitration is its expedition and its finality -- it is a means of quickly resolving the dispute within the bounds of acceptability. Statement of Kay McMurray, Director, Federal Mediation and Conciliation Service, and Michael F. Hollering, General Counsel of American Arbitration Association at ACUS Hearings, supra note 49. Thus, if the procedures of an arbitration are unduly complex or if subjected to searching review, its primary value is lost and, absent other needs the matter would likely be better resolved in a full trial.

curacy[61] will not be used. It is, therefore, perhaps inappropriate to expect that arbitration and trials would reach the same result in every case. In some instances arbitration may be viewed as the more accurate because of its flexible nature and its ability to draw on technical expertise. In other instances, the quality control procedures of the courts would be expected to reach a more "accurate" resolution. The question then becomes how much of a spread between the two is acceptable and at what cost.[62]

Benefits/Uses. To summarize and extend, arbitration is a particularly attractive means of dispute resolution when one or more of the following factors are present:[63]

- Time or transactions costs are more important than the "accuracy" of any one decision.[64]
- No decision is of critical importance to any party.[65]
- Technical expertise is important for the decision maker.
- The parties want to choose the basis of the decision, especially if it is to be different from the law that would be applied in a judicial proceeding.
- The parties desire privacy.

Drawbacks. Arbitration is generally not particularly suited where:

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[61] E.g. enforced discovery; findings of fact and conclusions of law; subpoena of witnesses; appeals.

[62] Many people clearly have a knee jerk reaction to arbitration as simply a sophisticated way to "split the difference" between the parties. That is, these people seem to feel impulsively that the arbitrator will not make an honest effort to apply the designated norms to the facts. Similar allegations can, and frequently are, much of virtually any decisional process. It seems a particularly unfortunate bias with respect to arbitration, however. In the abstract, if the parties are careful in selecting the arbitrator, the problem should not arise. More empirically, however, parties familiar with arbitration generally find it a satisfying way of resolving disputes with integrity.

[63] Paths to Justice, supra note 24, at 34; Goldberg, Green, and Sanders, supra note 9, at 8-9.

[64] For example, in a commercial or construction dispute, it may be more important to reach some decision than ensuring that it is "accurate" in the sense of emulating the decision a court would reach. That is necessary so the parties can get on with business based on the decision.

[65] Arbitration is frequently used where many claims need to be resolved expeditiously, no one of which is of fundamental importance to the parties. The parties may in fact integrate a large number of individual claims. For example, a labor union and a company will be parties to an arbitration agreement to resolve a variety of separate disputes. Whatever the variation of the award, "on the average" they would not only be acceptable but preferable to a more intensive form of resolution.

- Uniform results are desired -- reaching similar results in similar cases.
- The development of a "common law" or significant policy that will govern future decisions is important.
- Maintaining established norms or policies is important;[66] in these cases it is decided that the public policy expressed in established law outweighs the ability of the parties to alter it by selecting the norms or even the forum where the law will be applied.[67]
- Public scrutiny of the process and the result is desired.
- Strict "quality control" is important and cannot be supplied by providing for the technical expertise of the arbiter.
- The matter affects some who are not parties so that they will lack the ability to protect their interests in the outcome.

Administrative Arbitration

The putative benefits of arbitration are attractive indeed. Interestingly, some of the major reasons for the establishment of administrative programs and administrative, as opposed to judicial, adjudication was to tap many of these same virtues. For example, one early case, which exhibited a residual concern and discomfort with agencies, characterized their benefits:

> [T]he obvious purpose of the legislation [is] to furnish a prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task. The object is to secure ... an immediate investigation and a sound practical judgment, and the efficacy of the plan depends upon the finality of the determinations of fact with respect to the circumstances, nature, extent, and consequences of the [issues presented].[68]

The benefits of administrative decisions have been described more recently as avoiding judicial delays, application of expertise, and their efficiency.[69] Thus, the reasons giving rise to the current interest in arbitration and other forms of dispute resolution are a resounding echo of the very basis for the establishment of administrative agencies. But now agencies themselves face crushing caseloads[70] and are themselves accused of exhibiting problems similar to those of the courts for which they were to be the cure.[71] It is surely not surprising, therefore, that agencies,[72] Congress,[73] and private organizations[74] are anxious to find new ways to address the difficulties. Since the non-judicial forms of dispute resolution frequently fulfill the promise, their use in or adaptation to the administrative process is to be encouraged.

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[66] Wilco v. Swann, 346 U.S. 427 (1953); Alexander v. Gardener-Denver Co., 415 U.S. 36 (1974) (Title VII claims should be heard de novo in Federal Court even after they have been heard in a grievance arbitration). Katsoris, The Arbitration of a Public Securities Dispute, 53 Fordham L. Rev. 279 (1984); Edwards, Alternative Dispute Resolution: Panacea or Anathema?, 99 Harv. L. Rev. 668 (1986); Fiss, Against Settlement, 93 Yale L. J. 1073 (1984); Schoenbrod, Limits and Dangers of Environmental Mediation: A Review Essay, 58 N.Y.U.L.Rev. 1453 (1983).

[67] Paths to Justice, supra note 24, at 34.

[68] Crowell v. Benson, 285 U.S. 22 (1932).

Dispute resolution techniques can provide an entirely new range of tools for making administrative decisions or even alleviating the need for governmental decisions.[75] Thus, for example, they could take the burden off an overworked adjudicatory process and provide better "justice" at the same time. They can also provide a means of participation far better than that supplied by the APA itself, even under judicial gloss adding requirements.

Some problems that are addressed through command and control regulation can also be better addressed by establishing a dispute resolution mechanism to resolve individual disagreements in a far more personal, factual based means than could result from a generally applicable requirement that may as a practical matter leave the individual in the same situation as before a rule was promulgated.[76] The agency may be in a favorable position to supervise the minimal requirements of the dispute resolution mechanism instead of issuing and then policing a regulation. That process may work to the benefit of all concerned.

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[69] Administrative agencies are both efficient and speedy; and ... [a]gencies provide modern government with the informality of action and decision making usually found in large private business enterprises. Mezines, Stein, and Gruff, Administrative Law (1983) at 1-13.

[70] For example, 20,000 cases were referred to the 27 Federal agencies that employed at least one full-time administrative law judge in 1978. An additional 196,428 cases were referred to the Social Security Administration during the same year. Administrative Conference of the United States Statistical Report for 1976-1978 of Federal Administrative Law Judge Hearings, (1980) at 33.

[71] For example, the average time from complaint to disposition of a black lung case was nearly 1-1/2 years in the period 1976-78; it was more than 2 years for Service Contracts Act cases; more than 4 years for a Maritime Administration case; 2 years for Investment Company Act cases. ACUS, Federal Administrative Law Judge Hearings (1980). To be sure, arbitration would not be appropriate for some of these cases, but the point is that delay, complexity, and mounds of paper have surrounded administrative trials.

[72] CFTC, MSPB

[73] Superfund, PBGC, FIFRA, MSPB.

[74] The arbitration provisions of FIFRA were enacted at the behest of private organizations apparently seeking an expeditious resolution of a disagreement over payment for the use of data used to register a pesticide. See text accompanying note 409.

[75] Just as one need not find fault with a hammer to advocate including a screwdriver and pliers in a tool kit, one need not dwell on the failures of trials to advocate the adoption of ADR techniques. Rather, the techniques are alternative means of making decisions that are better suited in some circumstances.

Varieties of Administrative Arbitration

The discussion that follows is based predominately on the case studies of administrative arbitration that are contained in Appendix II. The arbitration programs that were studied are those of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA);[77] the Multiemployer Pension Plan Amendments Act of 1980[78] that is administered by the Pension Benefit Guaranty Corporation (PBGC); the reparations procedures of the Commodity Futures Trading Commission[79] (CFTC); the Comprehensive Environmental Response, Compensation and Liability Act[80] (Superfund); and the two programs of the Merit Systems Protection Board.[81] While certain patterns through several of the programs, no two are just alike. Together, they span virtually the full range of possible characteristics of arbitration programs. Their attributes are summarized in the accompanying table, and the details are available in Appendix II.

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[76] For an elaboration on this theme of the relationship between dispute resolution mechanisms (DRM) and regulation, see Harter, Dispute Resolution and Administrative Law: The History, Needs and Future of a Complex Relationship, 29 Vill. L. Rev. 1393, 1395-1400 (1984).

[77] 7 U.S.C. § 136 et seq.

[78] 29 U.S.C. § 1381 et seq.

[79] 7 U.S.C. § 18(b).

[80] 42 U.S.C. § 9601 et seq.

[81] 5 U.S.C. §§ 1101-8911.

TABULAR SUMMARY OF VARIETIES OF ADMINISTRATIVE ARBITRATION

CHARACTERISTIC	FIFRA	PBGC	CFTC	SUPERF	MSPB/ AAP	MSPB/ VEAP
Created by rule or statute	Stat	Stat	Rule	Stat	Rule/ stat	Rule/ stat
Use: voluntary or mandatory	Man	Man	Vol	Vol for pri.; man for gov't	Vol.	Vol.
Arbitrator: agency or private	Priv	Priv	Agency	Priv fr. agency list	Agency	Agency
Arbitrator: app'ted or parties choose	Choose	Choose	App't	Choose	App't	App't
Norms applied: agency rule; stat; none specified	None	Existing law	Same as formal	Rule	Same as formal	Same as formal
Proceeding: formal; informal	For	For	Inf	For	Inf	Inf
Record: full w/ tr. limited; or full if requested (vol).	Vol	Vol	Docs	Full	Vol	Vol
Decision: findings of fact; conclusions of law; award only; full opinion	FF/CL	Fact/ legal basis	Award; brief dis., no find.	Full	Summary of FF/CL	Summary of FF/CL
Agency Review: full limited; none	None	None	Limited	None	Limited	Full
Court Review: limited or arbitrary & capricious standard	Limited, but Tucker Act act.	Unclear: arb & cap or limited	None: "waived"	Arb & cap	Arb & cap	Arb & cap

IV
THE LEGAL ISSUES OF ADMINISTRATIVE ARBITRATION

Some limitations on the administrative use of arbitration need to be borne in mind when considering its use. Some of the problems are conceptual,[82] some are statutory,[83] and some are constitutional.[84] Some are practical:[85] arbitration may be an inappropriate tool to address the issues presented. Its benefits and drawbacks need to be considered when developing a program, and it should not be too quickly embraced without analyzing its utility in dealing with the specific matters to be resolved. With only a few exceptions, most of the obstacles can be overcome. Properly used, arbitration offers the administrative process the same promise it has provided for resolving private sector questions.

Statutory Limitations when the Government is a Party.

The Comptroller General has on several occasions, interpreted an obscure statutory provision with seemingly no relevance whatever[86] to prohibit agency use of arbitration in the absence of specific authorization. This section, enacted in 1909,[87] bars the use of public money for "the pay or expenses of a commission, council, board, or similar group, or a member of that group" unless that commission or board is "authorized by law." The Comptroller General has consistently found this prohibition applicable to arbitration panels established to determine the rights of the United States. The Comptroller General has also viewed Congress's express authorization of agency use of arbitration to indicate that agencies lack authority to submit disputes to arbitration in the absence of such authorization.

The Attorney General reviewed the legislative history of this prohibition on the use of funds to pay unauthorized commissions soon after its enactment. The Attorney General described the breadth of this prohibition when considering the Secretary of War's appointment of a committee of architects to assist in overseeing the development of the landscape surrounding Niagara Falls. The statute ascribing this duty to the Secretary did not expressly authorize such a committee. Nevertheless, the Attorney General approved appointment of this committee, arguing that "public officers have not only the power expressly conferred upon them by law, but also possess, by necessary implication, such powers as are requisite to enable them to discharge the duties devolved upon them."[88] The Attorney General determined that the prohibition on paying for unauthorized commissions was not intended to affect this implied authority. The legislative history shows that the bill as originally introduced would have prohibited all payments to all commissions or boards not "in specific terms authorized by

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82. See text at note 140.

83. See text at note 86 et seq.

84. See text at note 106 et seq.

85. See text at note 66.

86. 31 U.S.C. §1346.

87. Mar. 4, 1909, Ch. 299 § 9, 35 Stat. §1027.

88. 27 Op. Atty. Gen 432, 436 (June 26, 1909).

Congress." This language was later modified. The statute as enacted prohibits payment to boards not authorized by law. The Attorney General interpreted this legislative history to mean that commissions need not be authorized by specific statute but only have to be authorized generally. The opinion states "it would be sufficient if [commissions] authorized in a general way by law."[89] Thus, the Attorney General found that the Secretary of War was authorized by implication to appoint a committee of landscape architects to assist him in performing his duties of administration over Niagara Falls.

The Comptroller General adopted the Attorney General's analysis when he approved the payments made to the committee of landscape architects involved in the administration of Niagara Falls.[90] The Comptroller General reaffirmed this conclusion when it authorized the payments to a board of experts appointed by the Secretary of Interior to assist in administration of Indian schools. The Comptroller General stated, "If a board of experts is necessary to accomplish the purposes indicated, the employment of the members thereof would be authorized under the provisions of this appropriation. Such a board would be authorized by law within the meaning of the act of March 4, 1909."[91]

Despite these initial opinions, the Comptroller General soon began to read this prohibition more restrictively. In 1914, he refused to authorize the use of public funds to pay for the services of a commission which devoted itself to a matter it was not authorized by law to consider. The Mexican Border Commission had been authorized to negotiate boundary disputes. The comptroller determined that this Commission could not be paid for its work in negotiating the United States' and Mexico's rights to the use of water from the Rio Grande.[92] The Comptroller General also read the prohibition to bar payments to boards which were not clearly authorized by law. In 1925, the Comptroller General barred payment for a board of consulting engineers employed to assist in construction of the Coolidge Dam. The statute authorized payment for individual consultants but did not explicitly authorize the appointment of a board of consultants.[93] In another case, the Comptroller General determined that the Navy could not pay its share of the cost for arbitration of a contract dispute with a manufacturer because such a board was not authorized by law.[94]

In 1928, the Comptroller General applied the prohibition to an agency's submission to an arbitration panel. In reviewing a proposed lease between the government and a private company, the Comptroller General determined that the government could not accept a clause agreeing to arbitrate all disputes concerning the condition of the leased property at the end of the lease term. The Comptroller General rejected the arbitration clause for two reasons. First, he argued

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89. 27 Op. Atty. Gen at 437.

90. 16 Comp. Dec. 282 (Nov. 2, 1909).

91. 16 Comp. Dec. 422, 424 (Jan. 10, 1910).

92. 20 Comp Dec. 643, March 18, 1914.

93. 5 Comp. Gen. 231 (August 21, 1925).

94. 5 Comp. Gen. 417 (Dec.9, 1925).

that the act of March 4, 1909[95] prohibited the payment of boards not authorized by law, stating simply that the arbitration board called for under the lease was unauthorized. Second, the Comptroller General argued that the government's provision for contract dispute resolution precluded resort to an alternate forum. The Comptroller General argued that the existence of established procedures for resolving disputes with the government precluded the use of arbitration. The Comptroller General states, "provision having been made by law for the adjustment of claims that may arise under government contracts, there is no power or authority in any administrative or contracting officer of the Government, by means of a provision in a contract, to establish or provide for a different procedure for the adjustment of such claims."[96] These two views were subsequently relied upon to invalidate arbitration clauses in two additional contracts.[97]

The Comptroller General subsequently returned to the broad view of the term authorized by law reflected in earlier opinions. In 1942[98] he quoted extensively from the Attorney General's 1909 opinion.[99] Criticizing subsequent opinions, the opinion held "Subsequent decisions applying a more strict rule on the basis that the creation of commissions, boards, and similar bodies must be specifically authorized by statute may not have taken cognizance of the earlier history of the matter."[100] Concluding that the question of authorization did not bar government agreement to the inclusion of an arbitration clause in a lease of government property, the Comptroller General turned to the more general question of whether the existence of a prescribed method for resolving disputes against the government precluded agencies from adopting alternative means for resolving disputes.

The Comptroller General determined that there is no bar to the use of a board or panel to determine the factual question of reasonable value. Under the terms of the lease at issue, the government could only gain from the arbitration award as the lease provided that the value of the property could not be fixed at any rate less favorable than the original terms of the lease. The Comptroller General approved the inclusion of the arbitration clause under these conditions since the government could not lose under the process and the arbitrators were not deciding any questions concerning the legal liability of the government. These arbitrators were merely making a factual determination of the value of certain rental space.

The Comptroller General has refused to extend its acceptance of the use of arbitration beyond the function of fact finding or appraising value. In 1953, he decided the Navy lacked authority to submit to arbitration as prescribed in a contract it had signed with a Swedish company. After reviewing several nineteenth century court of claims decisions, the Comptroller General decided, "The conclusion seems warranted that in the absence of statutory authorization, either express or implied, officers of the Government have no authority to submit or to agree to submit to arbitration, claims which they themselves would have no authority to settle and pay."[101] He also concluded that Congress's express authorization of arbitration in some statutes, indicates that agencies generally lack the authority to submit to arbitration. The Comptroller General states, "The action of the Congress,... in authorizing the heads of executive departments to arbitrate certain specific and well defined matters might well, indicate ... that the executive branch has no general or inherent power to submit claims against the United States to Arbitration."[102] The Comptroller General's opinion of agency use of arbitration remains unchanged. The opinion is not based upon any statute, but is an inference drawn by the Comptroller General from Congress's explicit authorization of arbitration in several statutes.

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[95] 35 Stat. 1027.

[96] 7 Comp. Gen 541, 542 (March 3, 1928).

[97] 8 Comp. Gen. 96 (Aug. 28, 1928) and 19 Comp. Gen 700 (Feb. 3, 1940).

[98] 22 Comp. Gen 140 (July 10, 1942).

[99] Supra, note 90.

[100] 22 Comp. Gen. 140, 143.

The Comptroller General's most recent opinion concerning agency use of arbitration dates from 1978.[103] The Federal Trade Commission requested an opinion concerning the agency's decision to resolve a factual dispute with a contractor through binding arbitration. The Comptroller General held that such substitution for prescribed dispute resolution procedures would be improper, although an arbitrator who is in fact an appraiser is a desirable adjunct to the normal dispute resolution procedures. The Comptroller General also reiterated his position that he was approving only arbitration's use to determine the fact of reasonable value in situations in which the arbitrator did not impose any obligation on the government or leave questions of legal liability for the arbitrator's determination. The Comptroller General approved of the FTC's use of arbitration "to render a determination as to the reasonable value of work performed by the defaulted contractor ... so long as the prescribed disputes procedure and provisions for judicial review incorporated therein are not displaced."[104]

Thus, as a result of this line of holdings, the government cannot be **bound** by an agency's arbitration program unless it is specifically authorized by statute or is limited to factfinding. Absent these, an agency's arbitration must be nonbinding and hence the functional equivalent of a minitrial.

Given the erratic interpretation of the statute read to ban the appointment of arbitrators unless specifically authorized and the relatively this justification of a ban based on Congress's inclusion of specific provisions for arbitration, it seems appropriate for Congress to clarify this matter. In particular, an executive branch official should be allowed to use arbitration for making decisions within his or her authority if they believe that would be a beneficial means of doing so. Such authority would not, of course, pre-empt the existing authority of the Comptroller General and the General Accounting Office for "determin[ing] whether payments of public funds are warranted by applicable law and available appropriations."[105] Thus, an arbitral award would still be subject to a determination by GAO that its terms can be lawfully met.

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[101] 32 Comp. Gen 333, 336 (Jan. 27, 1953).

[102] Id.

[103] B-191484, May 11, 1978.

[104] Id. at 3.

Article III

The courts were clearly jealous of their prerogatives during the development of administrative law, and announced the need for judicial, not administrative, resolution of important matters, especially facts.[106] The need was raised to the Constitutional level. With the growth of the administrative state, the acceptance of decisions made by agencies and a limited form of judicial review -- to ensure that the determinations are based on substantial evidence -- also grew. The early doctrines gradually died.[107] Indeed, agency decisions became sufficiently accepted that few thought much about the old tension or that only Article III courts could hear and resolve some types of issues. Interestingly, the limitation on the use of entities other than courts to resolve matters has been rekindled recently. While it does not affect most administrative arbitration, the issue has arisen and it does define the outer boundaries of what can be done in it. The new requirements must clearly be taken into account when considering whether to develop a new administrative program.

Northern Pipeline Co. v. Marathon Pipe Line Co[108] held that the Bankruptcy Act of 1978 wrongfully delegated federal judicial power to individuals who are not Federal judges. Judges appointed under the Bankruptcy Act are not guaranteed the safeguards of life tenure and irreducibility of salary deemed essential to judges appointed under Article III. The arbitration program of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) was challenged on the similar grounds that the use of an arbitrator denied the parties their right to have the issue resolved by an Article III court.[109] The Court upheld the constitutionality of private arbitrators determining the amount of compensation a second or "me-too" pesticide registrant must pay to a prior registrant when EPA uses data submitted by the first registrant in support of the second pesticide registration on the grounds that it is a "public dispute."

The Court acknowledged Congress's discretion over the adjudication of public rights over one hundred years ago:

> There are matters, involving public rights, which may be preserved in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as

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[105] Steadman, Schwartz, and Jacoby, Litigation with the Federal Government (2nd Ed. 1983) at 205.

[106] Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920); Crowell v. Benson, 285 U.S. 22 (1932).

[107] Davis, Administrative Law and Government at 69; Estep v. United States, 327 U.S. 114, 142 (1946).

[108] 458 U.S. 50 (1982).

[109] Thomas v. Union Carbide Agricultural Products, 105 S. Ct. 3325 (1985).

it may deem proper.[110]

FIFRA illustrates that the public rights doctrine extends to disputes between private parties. FIFRA empowers arbitrators, who are not Article III judges, to adjudicate disputes between pesticide registrants over amounts of compensation due as a result of EPA's use of previously submitted data. The Court notes that this right to compensation is statutorily based and that pesticide registrants lose any claim to compensation based upon state property law when they submit the data to EPA with knowledge of FIFRA's data use provision.[111]

Although this right to compensation concerns private parties, the Court determined that this right carries many attributes of a public right since Congress created the right as part of a comprehensive regulatory scheme governing pesticide registration intended to safeguard the public health. The Court justified Congress's delegation to arbitrators by noting it could have granted EPA the power to decide the value or compensation due but instead chose to vest arbitrators with this authority. The use of this alternative does not raise this delegation of Congress's Article I legislative authority to the level of encroaching upon judicial power so as to violate Article III.

FIFRA does provide a role for the judiciary in its regulatory framework, however. It authorizes judicial review of an arbitrator's decision in cases of fraud, misconduct and misrepresentation. In Thomas, the Court found that this scope of judicial review satisfies the need to ensure an "appropriate exercise of the judicial function" because it provides judicial protection against "arbitrators who abuse or exceed their powers or willfully misconstrue their mandate under governing law."[112]

The Court summarized the scope of Article III limitation upon the delegation of decisionmaking power:

> Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, may create a seemingly "private" right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary. To hold otherwise would be to erect a rigid and formalistic restraint on the ability of Congress to adopt innovative measures such as negotiation and arbitration with respect to rights created by a regulatory scheme.[113]

Thus, the public rights doctrine is a broad, flexible doctrine which authorizes the delegation of quasi-judicial, decisionmaking authority to non- Article III judges when Congress adopts innovative approaches to the resolution of disputes as part of a regulatory scheme.

The latest explication of the nature of issues that agencies, and hence administrative arbitration, can hear came as recently as the end of last term. The D.C. Circuit held the Commodity Futures Trading Commission could not resolve a counterclaim involving state law in a proceeding arising out of the same transaction that was clearly within its jurisdiction because doing so would transcend Article III limitations.[114] The Supreme Court reversed, pointing out that Article III has two purposes: one is to protect an independent judiciary from encroachment by other fora, and the second is to afford parties the right to have their controversies heard by Article III judges.

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[110] Murray's Lessee v. Hoboken Land, 18 How. 272, 284 (1856).

[111] 105 S. Ct. at 3335, citing Ruckelshaus v. Monsanto, 104 S. Ct. 2862 (1984).

[112] 105 S. Ct. at 3339.

[113] 105 S. Ct. at 3340.

As to the first, the Court found the important factors to be considered are

> the extent to which the "essential attributes of judicial power" are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.[115]

The Court sustained the agency's resolution of the state law claim on the ground that the courts would still be called upon to enforce the order; the legal rulings would be subject to de novo review; the range of issues presented is narrow; and, the scheme did not oust the courts of jurisdiction since the parties could still proceed there instead of before the agency. The Court found, therefore, that the program was not a threat to separation of powers.

With respect to whether the parties could "waive" their rights to an Article III court, the Court held in reviewing the CFTC program that

> as a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried.[116]

Thus, Article III does not appear to raise any limitations on the use of arbitration to resolve public disputes. Nor is it a limit for resolving private disputes so long as consent is freely given by the parties and the courts maintain at least some role in reviewing and enforcing the order.

Article III could conceivably pose some restriction on the extent to which Congress could require mandatory arbitration as a way of resolving private disputes since the very limited judicial review could be regarded as an impermissible intrusion into the prerogatives of the judiciary. That courts are called upon to enforce the otherwise private award may not be sufficient basis of judicial involvement to protect this aspect of the separation of powers requirement. The Court's reasoning in Thomas, however, that the limited review of arbitral awards is sufficient to provide the requisite level of judicial protection necessary to meet the standards of Article III would seem to apply with equal vigor to private actions. Thus, even the mandatory arbitration of private disputes appears to meet the standard develop in Schor.

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[114] Schor v. Commodity Futures Trading Commission, 740 F.2d 1262 (D.C. Cir. 1984), vacated, 105 S. Ct. 3325, reinstated, 770 F.2d 211 (D.C. Cir. 1985), rev'd, 106 S. Ct. 3245 (1986).

[115] Id. at 3258.

[116] Id. at 3256.

Congress has authorized the use of arbitration as a means for adjudicating disputes involving public rights in a number of statutes. For example, the Randolph-Shepard Vending Stand Act[117] grants a preference to blind vending stand operators seeking sites on Federal property. Disputes concerning this program may be submitted to an arbitration panel convened by the Secretary of Education upon request of the individual, the state agency administering the program or by the Secretary. The arbitration panel's award is reviewable in the Federal District Court as if it were final agency action under the Administrative Procedure Act.

Other instances of Congressional authorization of arbitration include CERCLA or Superfund,[118] the Flood Insurance program,[119] Department of Defense design bid competitions,[120] patent interference cases[121] and the largest federal sector use of arbitration, the Civil Service Reform Act's requirement of arbitration of employee grievances.[122]

Administrative arbitration programs have been assailed on several additional constitutional grounds. That lower courts have sustained some of the challenges indicates their potential seriousness. Properly designed and used, however, administrative arbitration fits comfortably within the constitutional framework--at least as much as agencies themselves.

Article II: Requirement for Executive Decisions

Some issues may be so intertwined with government policy that they cannot be decided by a private arbitrator. Buckley v. Valeo[123] held that the "performance of a significant governmental duty exercised pursuant to a public law"[124] can only be discharged by an Officer of the United States appointed in accordance with the Appointments Clause of the Constitution.[125] The argument has been raised as to whether a private arbitrator could be authorized to make a binding decision in a matter in which an agency must make a final, binding decision, such as in rulemaking or revoking a permit.[126] Even in the case of revoking a permit, however, it would not seem inappropriate if the parties -- the agency, the permittee, and the interested interveners -- agreed to resolve a contested issue by submitting it to arbitration.[127] Doing so would seem analogous to stipulating a factual premise of the action. The ability of the arbitral decision to withstand challenge from a non-participating third party would likewise appear to be similar to the ability of a disgruntled third party to challenge a stipulation. In both instances, the decision is made by the government official, albeit in the one he has agreed to be bound by the arbitrator's decision. The officer or government employee presumably will have made that decision on the ground that it is in the government's overall interest to arbitrate the claim as opposed to consume resources to chase the issue through a more elaborate process.

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[117] 20 U.S.C. Sec. 107. See discussion infra at note 132.

[118] 42 U.S.C. Sec. 9612(b)(4)(G).

[119] 42 U.S.C. 4083.

[120] 10 U.S.C. 277(e).

[121] 35 U.S.C. §135(d). An advance notice of proposed rulemaking to establish procedures for the arbitrations was published at 50 Fed. Reg. 2294 (1985).

[122] See 5 U.S.C. 4303 and 7512.

[123] 424 U.S. 1 (1976).

[124] Id. at 140-141.

[125] Article II, Section 2, Clause 2.

The real question would seem to concern the extent to which the non-executive branch official is called upon to make policy determinations. As the quote from Buckley indicates, it is the **significant** decisions that must be made by government employees, not all decisions. Thus, the restriction would appear to bar the arbitrator's deciding major policy questions, not the factual basis of such a decision or a mixed question of law and fact in which the norms are already relatively well developed. Not only are these areas constitutionally doubtful, they are the very areas where the utility of arbitration is limited in the first instance. The Article II limits, therefore, do not appear to be a practical concern.

Delegation to Private Parties

A closely related issue is whether there may be limitations on the ability of the government to delegate powers to a private individual or institution. As the discussion above makes clear, the use of private arbitrators to make decisions closely affiliated with the government has been upheld on several occasions.[128] Although the law on this issue is far from clear,[129] there are undoubtedly **some** limits. Thus, the more central the decision is to an issue that only the government can make, the more likely it is that an agency must be in a position to review the matter before it can be final.

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[126] Memorandum of April 24, 1986 for Stephen J. Markman, Assistant Attorney General, Office of Legal Policy, from Samuel A. Alito, Jr., Dep. Ass't Attorney Gen., Office of Legal Counsel, Administrative Conference Recommendations on Federal Agencies' Use of Alternative Dispute Resolution Techniques.

[127] Indeed, EPA is considering doing just that with respect to the permitting of hazardous waste facilities. Robinson, U.S. Environmental Protection Agency Institutes Alternative Dispute Resolution in its Enforcement Program, 18 Dis. Res. News 6 (ABA Cmte. on Dis. Res. 1986). Memorandum of December 2, 1986 to Ass't Administrators, Regional Administrators, Enforcement Policy Work Group, Draft Guidance on the Use of Alternative Dispute Resolution Techniques in Enforcement Cases. The draft recognizes the statutory limitations, however, and limits the use of binding arbitration to factual situations. Id. at 4.

[128] Thomas v. Union Carbide Agr. Products Co., 105 U.S. 3325 (1985); Schweiker v. McClure, 456 U.S. 188 (1982).

[129] OLC Memorandum, supra note 126, citing Davis, Administrative Law Treatise 3.12 (2d Ed. 1978).

As in the discussion of the need for executive branch decisions, the extent to which this is a problem would seem to be directly correlated with the extent to which the arbitrator is called upon to make policy decisions, and that is precisely the area in which the utility of arbitration is questionable. For virtually all areas in which arbitration may be attractive, therefore, it does not raise constitutional difficulties.

Due Process

The manner in which reimbursements under Medicare are determined has been criticized as denying participants due process. Part A of the program provides insurance coverage for the cost of institutional health services, while Part B is a voluntary supplementary insurance program covering a percentage of costs for other medical procedures. Both parts are administered by private insurance carriers. Under the programs, claims for payment or reimbursement are submitted to the carrier. If the request is denied, the beneficiary may request a reconsideration. HHS' Health Care Financing Administration decides the matter for Part A and a different employee of the carrier makes the decision as to Part B. Under Part A, only controversies involving more than $100 may be appealed to the Secretary and judicial review is available only if the amount in dispute is $1,000 or more. Under Part B, the decision is final and non-reviewable. Thus, under Part B, a private "arbitrator" is assigned to decide the matter, and the decision is not subject to judicial review.

The use of a private individual to make decisions that are, to some degree or another, administrative decisions is certainly anomalous. The question would logically arise whether the types of decisions that are referred to the private arbitrators are such that they should be decided by government officials. The use of the private carriers to make the decisions in Medicare Part B was challenged as a denial of due process. The District Court agreed "insofar as the final, unappealable decision regarding claims disputes is made by carrier appointees ...."[130] In applying the test of Mathews v. Eldridge,[131] the court concluded that administrative law judges must hear the appeals. The Supreme Court reversed.[132] It held that the deciding employees did not have a conflict of interest since their salaries and any resulting claims are paid by the Government, not their employers. Moreover, the nature of the decision is determined by statute and regulation. Thus, the court found there is no reason to believe those making the decisions are not qualified to perform their tasks and hence that their margin of error is any greater than that for administrative law judges.[133] Thus, the court has approved private schemes at least to the extent they operate under procedures specified by the agency.

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[130] Schweiker v. McClure, 503 F. Supp 409, 418 (N.D. Cal. 1980).

[131] 424 U.S. 319 (1976). In determining the nature of a hearing that is minimally required by due process, the court is to balance the private interest affected by the official action; the risk of erroneous deprivation of such an interest through the procedures used; and the probable value of additional procedural safeguards; against the government's interest, including the function and expense of additional or substitute procedural safeguards.

[132] Schweiker v. McClure, 456 U.S. 188 (1982).

The need for minimum procedural safeguards was stressed in a subsequent case[134] involving the question as to whether an oral hearing must be held for claims for less than $100 or whether a paper hearing would be sufficient. The court laid down guidelines that must be followed if the oral argument was to be avoided, especially the adequacy of notice, access to the evidence on which the decision was made, and the ability to speak with someone who knows and understands the basis for the decision.

A second answer to the seeming conflict between using private arbitrators for public decisions is that the decisions are not entirely public: While the decisions may implement an administrative program and bear an intimate connection to it, the decisions are not those of the agency and are basically for the resolution of a controversy between private individuals and organizations.[135]

Unconstitutional Taking

FIFRA was also challenged that the arbitration program constituted an unconstitutional taking of private property in violation of the Fifth Amendment. The Court rejected the challenge in Ruckelshaus v. Monsanto.[136] Monsanto alleged that EPA's use of its data for the benefit of another applicant's pesticide registration effected a taking of Monsanto's property without just compensation.[137] The district court sustained the challenge.[138] The Supreme Court reversed, finding that while Monsanto and other data submitters may have a property interest in data submitted to EPA, these companies cannot allege that a taking occurs when EPA uses this data in a manner which was authorized at the time the data was submitted.[139] The Court noted, however, that under the statutory scheme in effect between 1972 and 1978 data submitters could have a legitimate claim that documents submitted under the designation "trade secrets" between 1972 and 1978 were improperly taken when used for the benefit of other pesticide registration applicants.[140] Such an allegation would depend upon the actual amount of compensation received in arbitration. The Court found that

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[133] 456 U.S. at 200.

[134] Gray Panthers v. Schweiker, 716 F.2d 23 (D.C. Cir. 1983).

[135] This is not the case in some of the Superfund cases in which a claimant disputes the Administrator's denial of liability or the amount claimed from the fund.

[136] 104 S.Ct. 2862 (1984).

[137] 104 S. Ct. at 2871.

[138] Monsanto Co. v. Acting Administrator, United States Environmental Protection Agency, 564 F. Supp. 552 (ED Mo. 1983).

[139] 104 S. Ct. at 2872-2877.

[140] 104 S. Ct. at 2877-2879.

Monsanto had not yet had any issue of compensation submitted to arbitration and thus no issue of taking had yet arisen.[141]

The Court held, however, that any data submitter seeking to contest an arbitrator's compensation award retains the right to challenge the amount of compensation in the United States Court of Claims.[142] The Court ruled that the Tucker Act offers a potential remedy to any data submitter whose data is used or taken by EPA for the benefit of another applicant. Thus, any data submitter who is dissatisfied with an arbitration decision may sue the United States in the Court of Claims under the taking clause on the ground that it did not receive just compensation for the use of its data.

Standardless Delegation

FIFRA has also been assailed as an unconstitutional delegation of legislative power because the statute is alleged to offer so little guidance as to the standards an arbitrator should apply in administering the data compensation program.

The Supreme Court did not address this issue in Monsanto[143] because Monsanto's claim concerning the constitutionality of the arbitration scheme was not ripe for review since it had not been subject to any arbitration. In contrast, the district court[144] had found the arbitration provision arbitrary and vague. Similarly, the district judge in Union Carbide Agricultural Products v. Ruckelshaus[145] remarked that FIFRA represents a standardless delegation of power to arbitrators.

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[141] 104 S. Ct. at 2878.

[142] 104 S. Ct at 2880-2882. The Tucker Act, 28 U.S.C. § 1491 provides that any individual who believes that the United States has taken his property may bring this claim for compensation before the United States Claims Court. The Tucker Act states:

> The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort.

The Court held that in the absence of specific legislation addressing their interaction, the Tucker Act remedy and FIFRA's data compensation scheme must coexist. Thus, the Court interpreted FIFRA as "implementing an exhaustion requirement as a precondition to a Tucker Act claim. That is, FIFRA does not withdraw the possibility of a Tucker Act remedy, but merely requires that a claimant first seek satisfaction through the statutory procedure." 104 S. Ct. at 2881.

[143] 104 S. Ct. 2862 (1984).

[144] Monsanto v. Acting Administrator, United States Environmental Protection Agency, 564 F. Supp. 552 (ED Mo. 1983).

The court in Sathon, Inc. v. American Arbitration Association[146] refused to issue a declaratory judgment as to the standard an arbitrator must apply in determining the amount of compensation due. Sathon sought a declaratory judgment to determine whether it must pay to an original data submitter a share of the cost of producing the data used or whether it must pay a share of the value of its use. The court sustained the vague criteria of "compensation," saying:

> It is up to Congress to say what standards are to be applied or to delegate this authority. There is nothing in the statute (or the regulations promulgated thereunder) relating to the standard to be applied in such proceedings or providing for judicial intervention in such matters.[147]

Another court concurred that arbitrators under this scheme are not required to apply an particular allocation formula, and that the absence of a specific standard was not unconstitutionally impermissive as a denial of due process or excessively broad delegation of authority.[148]

Conclusion: Properly Executed Arbitration Programs are Constitutional

The courts which have interpreted the Multiemployer Pension Plan Amendments Act of 1980's[149] (MPPAA) arbitration provisions thus far have been called upon to determine the Act's constitutionality and have not actually reviewed an arbitration decision under the Act. MPPAA has been upheld against assertions that its provisions violate standards of due process;[150] deny employers access to an impartial tribunal;[151] commit a taking of property without just compensation;[152] violate the Seventh Amendment's provision for trial by jury;[153] and constitute a violation of Article III of the Constitution by vesting federal judicial power in arbitrators who are not federal Article III judges.[154]

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[145] 571 F. Supp. 117 (SD NY 1983), rev'd sub nom., Thomas v. Union Carbide Agricultural Products, 105 S. Ct. 3325 (1985).

[146] No. 83 Civ. 6019 (U.S. District Court N.D. Ill., March 30, 1984) 20 ERC 2241.

[147] 20 ERC 2245.

[148] PPG Industries, Inc. v. Stauffer Chemical Co., 637 F. Supp. 8 (D.D.C. 1986).

[149] P.L. No. 96-364, 94 Stat. 1217, codified at 29 U.S.C. Sec.1381 et seq.

[150] See, Pension Benefit Guaranty Corp v. R.A. Gray, 104 S.Ct. 2709(1984) (Court held constitutional MPPAA's retroactive imposition of withdrawal liability.)

[151] See discussion in text, Board of Trustees of the Western Conference of Teamsters Pension Trust Fund v. Thompson Building Materials, Inc, 749 F. 2d 1396 (9th Cir. 1984); Washington Star Company v. International Typographical Union Negotiated Pension Plan, 729 F. 2d 1502 (D.C. Cir. 1984); Peick v. Pension Benefit Guaranty Corp. 724 F. 2d 1247 (7th Cir. 1983).

Administrative arbitration programs have been attacked on a broad range of constitutional grounds. Thus far all the challenges have been rebuffed. It would therefore appear that such a program will pass constitutional muster and can decide any issue an agency can so long as they adhere to at least minimal procedures, avoid major policy matters, and are subjected to at least some judicial review -- even the narrow standard of the Arbitration Act.

V

HYBRID PROCESS

As should be clear by now, several of the administrative arbitration programs are actually hybrids between administrative and private sector processes.[155] They typically are used to resolve issues that arise **because of** an administrative program and are administered at least in part by an agency, but they are not part of the agency itself. That is, the decision reached is not an agency order. The agency, however, is charged with defining the process to be followed. Sometimes, as in Superfund, the agency is a party, but in others, such as PBGC and FIFRA, it is not. It seems likely that prior to the interest in alternative means of dispute resolution the issues submitted to arbitration would have been resolved by the agency itself in some sort of trial type hearing. For example, prior to FIFRA's amendment, EPA made the determination as to how much compensation is due; now the arbitrator does.[156] Since the programs are so intimately connected to the agency and implement part of an agency program, they have some of the attributes[157] of agency action. Moreover, in some of the programs, the arbitration is the only forum available for resolving the matter. It is therefore unlike voluntary arbitration and more like an administrative or judicial hearing in which the process is imposed on the parties. Thus, administrative arbitration might sometimes be thought of in conceptual terms as similar to an administrative hearing.

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152. Board of Trustees of the Western Conference of Teamsters Pension Trust Fund v. Thompson Building Materials, Inc., 749 F. 2d 1396, 1406 (9th Cir. 1984) (taking clause does not prohibit Congress from readjusting contractual relationships of private parties); accord, Peick v. Pension Benefit Guaranty Corp., 724 F. 2d 1247, 1274-1276 (7th Cir. 1983).

153. Washington Star Company v. International Typographical Union Negotiated Pension Plan, 729 F. 2d 1502, 1511 (D.C. Cir. 1984); Peick v. Pension Benefit Guaranty Corp., 724 F. 2d 1247, 1277 (7th Cir. 1983).

154. Board of Trustees of the Western Conference of Teamsters Pension Trust Fund v. Thompson Building Materials, 749 F. 2d 1396, 1404-1406 (9th Cir. 1984).

155. FIFRA, PBGC, Superfund.

156. See discussion infra at note 404.

157. E.g. judicial review for some, but not all of them.

But, these programs also have some of the attributes of private sector arbitration, such as a reduced record, a private arbitrator, the parties' having a role in choosing the person who will decide, and decisions required by rule to be reached far more quickly than is customary for administrative litigation.

The administrative arbitration programs are, therefore, to a very real extent a hybrid, having both public and private characteristics. Sometimes the two collide. The difficulty is made more confusing by no two being alike.

The Arbitrators.

Arbitrators are basically selected in one of three ways in administrative arbitration programs, although a fourth way is clearly possible. The first is the private analog in which the parties participate in selecting the arbitrator. They may agree directly on an individual to serve as the arbitrator. Barring that, and the procedure contemplated in several of the programs, the parties are tendered a list of potential arbitrators. Each party may then either strike a designated number of individuals from the list or rank those on the list according to preference. The arbitrator is then chosen from those remaining on the list or from those with the highest overall ranking.[158]

The PBGC is a fairly typical example as to how arbitrators are selected. Under the PBGC final rules, the parties shall select an arbitrator within 45 days of initiation of arbitration or at a mutually agreed time. Several comments to the proposed rule on this issue suggested allowing the parties to select the arbitrator before initiation of arbitration. PBGC rejected the suggestion because it believes that post-initiation selection will reduce the risk of jeopardizing the arbitrator's neutrality.[159]

In its proposed rules, the PBGC invited comments on the usefulness of a PBGC-maintained roster of qualified arbitrators. The PBGC agreed with the majority of comments that such a roster would duplicate those already maintained by private organizations. PBGC will not, therefore, implement the proposal.[160] The American Arbitration Association (AAA) maintains a roster of qualified arbitrators from which it makes selections after parties in dispute have had an opportunity to rank the acceptability of the candidates.[161] The PBGC noted in the preamble of the final rules, however, that plan sponsors may still maintain their own rosters without violating preselection restrictions.[162]

The PBGC .rules do not state specific qualifications for the arbitrator because, after considering comments on the issue, the PBGC determined that the arbitrator would assuredly be qualified because the parties are required to select him by mutual agreement.[163]

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[158] Superfund; see discussion at note 567. FIFRA; see discussion at note 416.

[159] 50 Fed. Reg. 34686.

[160] 50 Fed. Reg. 34679.

[161] AAA rules - Section 12.

[162] 50 Fed. Reg. 34680.

Upon accepting an appointment, each arbitrator must disclose to the parties any "circumstances likely to affect his impartiality."[164] If any party determines that the arbitrator should be disqualified on the ground that he is not impartial, he must request, within 10 days, that arbitrator withdraw. If the arbitrator agrees that he is no longer impartial, he must withdraw from the proceeding and notify the parties of his reasons.[165] One comment to the PBGC proposed rule on this issue argued that disqualification would be too easy under the rule, while another argued that the rule should provide the parties with a mechanism to compel the arbitrator to withdraw. The PBGC concluded that its final rule has struck a reasonable balance.[166]

If a selected arbitrator declines appointment or, after accepting, withdraws, dies, resigns, or is for some reason unable to perform his duties, the parties shall select another arbitrator within 20 days of receiving notice of the vacancy.[167] PBGC initially proposed allowing 45 days for selecting a new arbitrator but reduced the limit because the parties will have had already identified suitable candidates during the original selection.[168] The parties may seek designation and appointment of an arbitrator in a U.S. District Court if they are unable to do so within the time limit of the rules.[169]

The second way is for the arbitrator to be a private individual who is imposed on the parties without their participating in the selection. This process is used in any of the case studies, and it is followed in the administration of the Medicare program administered by the Department of Health and Human Services.

The third means of obtaining an arbitrator is for the agency to appoint an agency official to serve that function. The CFTC and the MSPB follow this model. This is unlike the typical binding commercial arbitration, but quite similar to the non-mandatory court annexed programs. The dispute in both instances is submitted to the arbitrator only with the parties' concurrence. Thus, the parties can decide whether the nature of the dispute and their respective needs are such that this procedure is in their interest to pursue. Hence, although some of the protections normally afforded in arbitration is lacking, the parties are in a position to make the choice of whether or not to invoke the process. Indeed, the Medicare decision would indicate that the process should be fully acceptable even if imposed on the parties, so long as minimally acceptable procedures are followed in reaching the decision.

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163. 50 Fed. Reg. 34679.

164. § 2641.3(b).

165. § 2641.3(c).

166. 50 Fed. Reg. 34681.

167. § 2641.3(d).

168. 50 Fed. Reg. 34681.

169. § 2641.3(e).

The fourth means of appointing an arbitrator would be for the parties to choose from among a list of agency personnel. The Chicago office of the Merit System Protection Board are selected in this way,[170] and arbitrators for Superfund are selected from an agency approved list of private individuals.

Norms and Precedents.

Some administrative arbitration programs are directed to apply existing law and precedent.[171] In such cases, they are alternative procedures to the same end as a more formal process.[172]

Several of the programs are explicitly non-precedential, in that an arbitral decision in a matter cannot serve as resolving any issue for any purpose other than that before the arbitrator.[173] The CFTC believes the lack of precedential or res judicata effect is a positive incentive to use the arbitration process since a decision will not have a potentially damaging collateral effect.[174] Several comments on the PBGC's proposed rule indicated, however, that they thought compiling the awards would provide valuable guidance for future decisions.

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170. Adams and Figueroa, Expediting Settlement of Employee Grievances in the Federal Sector, (Report to ACUS Evaluating MSPB's Appeals Arbitration Procedure) (1985) at 31.

171. PBGC, CFTC, MSPB. Whereas the arbitrator in the PBGC is to apply existing law, the agency has noted that the regulation establishing the program does not tell the arbitrator just where or how to find it. 50 Fed. Reg. 34,681.

172. For example, in reviewing the difference between arbitration under a collective bargaining agreement and review by the Merit Systems Protection Board, the court said:

> While undoubtedly hoping to encourage employee selection of the grievance-arbitration process, Congress did not wish that choice to be made on the basis of a predictable difference in substantive outcome. To the contrary, it envisioned a system that would, as between arbitration and MSPB procedures, 'promote consistency ... and ... avoid forum shopping.'" Thus, "the arbitrator's authority can be no less than the MSPB's but also ... it can be no greater." Devine v. Pastore, 732 F.2d 213, 216 (D.C. Cir. 1984).

And see, Cornelius v. Nutt, 105 S.Ct. 2882 (1985).

173. CFTC. For example, in Superfund, 40 C.F.R. 305.51(c) provides:

> No award or decision shall be admissable as evidence of any issue of fact or law in any proceeding brought under any other provision of CERCLA or under any other provision of law. Nor shall any prearbitral settlement be admissable as evidence in any such proceeding.

174. Nelson, CFTC's New Rules: Some Innovative Approaches to Adjudication; 9 Ad. L. News 1 (1984).

Unlike the others, the FIFRA program does not provide any guidance to the arbitrator as to the norm to apply. Because of its lack of standards, it has been attacked as an impermissive grant of legislative power to the arbitrator, and at least two courts have agreed.[175] Others, however, have not.[176] The matter is likely to be raised again until a definitive resolution is made.[177] Whether permissible or not, such standardless arbitration appears inadvisable. Arbitration is generally not appropriate for developing a "common law" or other definitive norm that is to provide guidance for future conduct.[178] Without existing standards and without such a common law, decisions would run the risk of being arbitrarily ad hoc when criteria should be developed. The major issue -- whether compensation should be based on cost of developing the data or its value once developed -- is not likely to be resolved by the expertise of the administrator, nor supplied by reference to an external standard. At minimum, such a program should authorize the affiliated agency to issue rules to establish the major guidelines that will be applied.

Record and Explanation.

The Administrative Procedure Act and many of the cases imposing the requirement for "some sort of hearing"[179] rely largely on paper for minimal quality control: They require a decision to be based on a record and be explained as to what facts the decision maker believes flow from that record, as well as the conclusions of law. This process permits a reviewing court or other body to look over the shoulder of the decision maker to ensure an acceptable level of accuracy. A major advantage of arbitration is its speed and finality, with the quality control provided by other means. In it, paper is a means to the decision but largely ancillary for purposes of oversight. The nature and purpose of the "record" is therefore different in arbitration as opposed to a judicial or administrative hearing.

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175. Monsanto v. Acting Administrator, 564 F. Supp. 552 (E.D. Mo. 1983), rev'd on other grounds sub nom. Ruckelshaus v. Monsanto Co., 104 U.S. 2862 (1984); Union Carbide Agricultural Products v. Ruckleshaus, 571 F. Supp 117 (S.D.N.Y. 1983), rev'd sub nom, Thomas v. Union Carbide Agricultural Products, 105 S. Ct. 3325 (1985).

176. Sathon, Inc. v. American Arbitration Association, 20 ERC 2241 (N.D.Ill. 1984).

177. The issue was pressed in the Supreme Court in Thomas v. Union Carbide Agricultural Products Co., 1055 S. Ct. 3325 (1985) but the Court decided it

> was neither adequately briefed nor argued to this Court and was not fully litigated before the District Court. Without expressing any opinion on the merits, we leave the issue open for determination on remand.

105 S. Ct. at 3340.

178. Although addressing problems with settlements and not arbitration, the need for establishing and adhering to norms is raised by Edwards, Fiss, (1984), and Schoenbrod, all supra, note 66.

179. Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267, 1316 (1975).

Thus, for example, in most of the administrative arbitration programs that were surveyed, a full record could be generated at the request of a party but are not as a matter of course. To be sure, the arbitral decisions turn on written materials that are disgorged through some sort of discovery and introduced at a hearing but, absent a request, transcripts of the hearing are typically not kept nor are the decisions explained with the rigor of an administrative decision.[180] The decision is usually a review of the factual and legal basis of the decision, but the rules typically indicate it is to be more abbreviated.

If administrative decisions are to be fully reviewed in another forum,[181] they may need a fuller explanation and a more fully developed record than is customary in private sector arbitration. That, of course, comes at the expense of time and cost; and, indeed, subsequent review also comes at the cost of finality.

Privacy.

One of the reasons parties sometimes choose private sector arbitration is that the record and the decision itself can be kept private and confidential. To the extent the arbitration is viewed as part of an administrative program, the expectation would be that they should be accessible to the public, or conducted "in the sunshine." In those programs in which the program is a part of the agency itself and results in an agency decision,[182] the Freedom of Information Act would apply and hence the record would be subject to full public access. The others, however, do not result in an agency decision. Thus, if the agency is not a party,[183] FOIA would not apply.[184] In that case, the proceeding likely

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[180] This point was emphasized by the D.C. Circuit in a case reviewing the nature of judicial review of an arbitrator's decision concerning disciplinary proceedings against a government employee:

> If arbitration becomes simply another level of decision making, subject to judicial review on the merits, arbitrators may begin to decide cases and write opinions in such a way as to insulate their awards against judicial reversal -- producing opinions that parrot the appropriate statutory standards in conclusory terms, but suffer from a lack of reasoned analysis. Such a shift from the arbitral model, in which decision makers are free to focus solely on the case before them rather than on the case as it might appear to an appellate court, to the administrative model, in which decision makers are often concerned primarily with building a record for review, would substantially undercut the ability of arbitrators successfully to resolve disputes arising out the employment relationship. Devine v. White, 697 F.2d 421, 436 (D.C. Cir. 1983).

[181] See infra concerning agency and judicial review.

[182] MSPB, CFTC

[183] PBGC, FIFRA

(continued...)

could remain confidential absent overriding rules or statute. If, of course, the agency is a party, as in Superfund, then FOIA would apply to its records and hence likely that of the entire proceeding.

Review by the Agency.

To the extent the arbitration results in an agency order, the traditional relationship between the decision made by the hearing officer and the agency would provide for either appeal to the agency or discretionary review by the agency on its motion. One of the attributes of voluntary arbitration, however, is its finality. Thus, again, the two concepts collide in concept.

The Merit Systems Protection Board, for example, initially provided for agency review only to address harmful procedural irregularity or a clear error of law. While more review than under commercial arbitration, it was more limited than usual. In response to views of the parties that typically appear before it, the Board changed its Appeals Arbitration Procedure into the Voluntary Expedited Appeals Procedure in part to provide full appeal to the agency.

The CFTC's arbitration program provides that the agency may review a decision on its own motion to determine that it is not the result of any fraud, partiality, or other misconduct. In this case, the agency is providing the same narrow review typically accorded voluntary arbitration.

To the extent the arbitral award becomes an agency order, it would seem appropriate for the agency to have some power to review to ensure it meets minimal levels of acceptability. To ensure the benefits of expedition and finality, however, that review should be quite narrow, probably akin to the standard of judicial review under the arbitration act. Thus, an agency should review only for gross deviation from policy or procedure, which is the administrative analog of the award's being outside the scope of the arbitrator's authority.

The hybrid programs,[185] however, have no review by the agency. That is likely stems from a view that the very reason for the arbitration is that the matter is largely a private sector dispute that does not require agency action.[186]

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[184] Even if a private arbitrator is retained by an agency, it would not appear that the arbitrator's records that are developed in a hearing are agency records for purposes of FOIA. They would seem analogous to records developed by a government contractor to which the government has access, in which case the Supreme Court held that they are not agency records. Forsham v. Harris, 445 U.S. 169 (1980). Moreover, if the record remain in the possession of the arbitrator, the agency is not obligated to retrieve them. Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136 (1980).

[185] PBGC, FIFRA, Superfund.

[186] Superfund does not fit this model. Its arbitration program applies standards developed by the agency and determines the agency's liability. Thus, it is clearly not a "private" dispute. The fact that the decision is not made by

(continued...)

Hence there is no reason for the agency to be involved in reviewing let alone deciding.

Judicial Review

There are essentially three forms of judicial review of administrative arbitration decisions: none; limited, akin to traditional arbitration; and some variant of the APA's arbitrary and capricious standard.

No Review: Waiver. If parties decide to use an arbitration program to resolve an existing dispute, one component of that election could be a waiver of any right to seek the judicial review normally accorded administrative action. That is, by opting into arbitration, the parties would opt into its full ramifications, including its finality. The CFTC programs follow this approach. The Supreme Court recently sustained such waivers of judicial review on the ground that the right to have the dispute heard by an Article III court is a personal one, and hence it may be waived.[187]

The extent to which such waivers are enforceable when the election is made **before** the dispute arises is open to question, at least in some instances. The Supreme Court has held that a predispute agreement to arbitrate any claim that would arise between a securities broker and its customer is not enforceable since it could derogate rights provided by the Federal securities laws.[188] Although the case has been questioned and limited,[189] it continues to stand for some limitation on the ability of a person to sign away his or her rights to an administrative or judicial proceeding. Moreover, the Court has followed this line of reasoning in other cases. It recently held that even though some aspects of a matter may be arbitrated, an arbitral award could not preclude a judicial role in protecting the federal statutory and constitutional rights that Section 1983 is designed to

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186.(...continued)
an agency official may indicate a distrust for the ability of separation of functions doctrines to result in impartiality while still wanting to maintain enough control over the process that it will result in expeditious, acceptably decisions; the alternative would be to rely on the courts, and the agency could not set the agenda there.

[187] Schor v. Commodity Futures Trading Commission, 106 S. Ct. 3245 (1986).

[188] Wilko v. Swann, 346 U.S. 427 (1953).

[189] See, Dean Witter Reynolds Inc. v. Byrd, 105 S. Ct. 1238 (1985). The lower courts split as to Byrd's effect, with some holding that preenforcement agreements to arbitrate securities disputes were enforceable, Halliburton & Assoc., Inc. v. Henderson, Few & Co., 774 F.2d 441 (11th Cir. 1985), while others disagreed and continued to apply Wilko's traditional limitation, Conover v. Dean Witter Reynolds, Inc., 794 F.2d 520 (9th Cir. 1986).

The Supreme Court has granted certiorari to resolve the matter. McMahon v. Shearson/American Express, 788 F.2d 94 (2d Cir.) cert. granted, 107 S. Ct. 60 (1986). The resolution of this case should have a significant effect on the extent to which predispute agreements to arbitrate matters involving of public policy are enforceable.

safeguard.[190] Thus, neither full faith and credit nor a common law rule of preclusion of review would permit a court to accord res judicata effect to an unappealed arbitration award.

The combined teaching of these cases is that if a dispute involves important public rights, the court may invalidate an agreement to subject them to binding arbitration and hence a party could still have the matter heard in a traditional manner.[191] In other instances, however, the agreement is enforced, and the matter is referred to arbitration, with its limited review.[192] While technically not "waiver" cases in that such an agreement would preclude judicial review altogether and arbitration has some judicial review, the cases do mark an outer boundary of the ability of parties to sign away their rights before a dispute arises.

Limited. Judicial review of traditional arbitration awards is very narrow. The United States Arbitration Act[193] directs courts to enforce the awards except (a) where it was procured by corruption, fraud, or undue means; (b) where there was evident partiality or corruption in the arbitrators; (c) where the arbitrators were guilty of misconduct in the conduct of the hearing to the extent the rights of any party were prejudiced; or (d) where the arbitrators exceeded their powers assigned under the agreement.[194]

The standard applied in FIFRA tracks this approach. It provides for judicial review only in the case of "fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrator...."[195] The Court has acknowledged that limited judicial review is permissible[196] and has upheld it against

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[190] MacDonald v. City of West Branch, 104 S. Ct. 799 (1984). See also, Alexander v. Gardner-Denver, 415 U.S. 36 (1974).

[191] Other aspects of an arbitration agreement may be enforced, however. Thus, when a securities agreement provided that "Any controversy between you and the undersigned arising out of or relating to this contract or breach thereof shall be settled by arbitration" the portion arising under the Federal law was heard by a court since the dealer assumed it would not be referred to arbitration, but that arising under state law was ordered arbitrated. Dean Witter Reynolds Inc. v. Byrd, 105 S. Ct. 1238 (1985).

[192] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 105 S.Ct. 3346 (1985).

[193] 9 U.S.C. § 10.

[194] As "a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Moses M. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983).

[195] 7 U.S.C. Sec. 136a(c)(1)(D)(ii).

[196] Many matters that involve the application of legal standards to facts and affect private interests are routinely decided by agency action with limited or no review by Article III courts. See, e.g., 5 U.S.C. §§ 701(a)(1), 701(a)(2); Heckler v. Chaney, 105 S. Ct. 1649 (1985); United States v. Erika, Inc., 456 U.S. 201, 206, (1982) (no review of Medicare reimbursements); Monaghan, Marbury and the Administrative State, 83 Colum. L. Rev. 1, 18 (1983) (administrative agencies can conclusively adjudicate claims created by the

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a challenge that it constitutes a wrongful delegation of judicial power to the arbitrator.[197] The Supreme Court left open the possibility, however, that a dissatisfied data provider could sue in the Court of Claims for a "taking" under the Tucker Act.[198] Thus, the Court seems to indicate that it does not regard the arbitral award as a judicial finding, since presumably there would be no "taking" if the amount were judicially determined.[199] This may result in the anomalous result that a dissatisfied data submitter could obtain judicial review of the arbitral award by suing in the Court of Claims, whereas the data user may have difficulty securing a similar review.

Arbitrary or Capricious. The MSPB and Superfund programs both provide for "arbitrary and capricious" scope of judicial review.[200] For example, the Superfund rules provide:

196.(...continued)
administrative state, by and against private persons); Redish, Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision, 1983 Duke L. J. 197 (same).

Thomas v. Union Carbide Agricultural Products, Inc., 105 S. Ct. 3325, 3334 (1985).

[197] Thomas v. Union Carbide Agricultural Products, Inc., 105 S. Ct. 3325 (1985).

[198] Ruckelshaus v. Monsanto, 104 S. Ct. 2826 (1984).

[199] The Court has made quite clear that arbitration is not a judicial proceeding subject to full faith and credit. Dean Witter Reynolds Inc. v. Byrd, 105 S. Ct. 1238 (1985).

[200] Under the Randolph-Sheppard Vending Stand Act, 20 U.S.C. Sec. 107, blind persons who are licensed as vendors by state agencies may receive preference in obtaining vending stands on federal property. An individual who is dissatisfied with the state agency's actions may obtain a hearing on the state level. If he or she remains dissatisfied, he or she may request the Secretary of Education to establish an arbitration panel to hear the dispute. A state agency may also request arbitration whenever it believes a federal agency or department is not complying with the Act.

The arbitration is the exclusive remedy for an alleged grievance, notwithstanding Congress's saying it "may" be used. Hence someone who believes he or she has been denied such a preference must submit the complaint to arbitration before pursuing the matter in court. That is, it has been held that the arbitration is an administrative remedy that must be exhausted before a court will entertain the complaint. Randolph-Sheppard Vendors of America v. Weinberger, 795 F.2d 90 (D.C. Cir. 1986).

While the awards are "final and binding on the parties," 20 U.S.C. Sec. 107d-1, they are "subject to appeal and review as a final agency action" under the APA, 20 U.S.C. Sec. 107d-2. Thus, the arbitrary or capricious standard applies to these arbitrations. The court in Georgia Department of Human Resources v. Bell, 528 F. Supp 17 (N.D. Ga. 1981) reviewed an award under 5 U.S.C. Sec. 706 as final agency action, as if it had been made by the agency itself.

> The award or decision of [an arbitrator] shall be binding and conclusive, and shall not be overturned except for arbitrary or capricious abuse of the [arbitrator's] discretion.[201]

The scope of review under PBGC is more complicated. One part of the statute indicates that the arbitrator's findings of fact are to be presumed correct subject to rebuttal only by a clear preponderance of the evidence.[202] This would appear to provide for de novo judicial determination of issues of law and a review of facts under a "clear preponderance of the evidence" standard. The matter is confused, however, by another section of the Act which directs that, to the extent consistent with the Multiemployer Pension Plan Amendments Act of 1980, the awards are to be enforced under the limited provisions of the United States Arbitration Act. At least one court has held that only the limited scope of review provided commercial arbitration is available.[203] Most courts, however, have interpreted the Act as providing for the broader review.

One case draws an important analogy between the arbitration and administrative agencies.[204] It argues that "judicial deference to the arbitration process [under the Act] is mandated by the same policies that underlie the principles of judicial deference to administrative agencies."[205] Thus, the decisions are reviewable, like those of an agency, to determine whether the applicable law was correctly applied and whether the findings comport with the evidence. Like an agency, the arbitrator will be someone skilled in pension and labor matters and thus likely to fashion a resolution superior to a court in matters within that expertise.

An MSPB case wrestled with the relationship between an arbitration award and the court in words reminiscent of the origins of the "hard look" doctrine:[206]

> For judicial deference to arbitral decisions to have meaningful application, the reviewing court must be confident that the arbitrator has undertaken a thorough review of each aspect of the ... action.[207]

Thus, the standard that has evolved in several of the administrative arbitration programs is for a court to review an award as if it were a decision of an agency. This standard may be appropriate in those cases where the arbitration is mandatory,[208] in that it is the only means available for resolving the dispute. In that case, the fuller judicial review may be an important protection. Even in this case, however, the courts should recognize the benefits that were supposed to be derived from the arbitration scheme, as opposed to reliance on administrative adjudication under the APA, and hence accord deference to the arbitral award or some other form of limited review so long as there is an indication of the proper standards' being applied.[209] Perhaps, the proper standard of judicial review should be no different than that of agency action before it became more intrusive: a rational basis test.

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[201] 40 C.F.R. Sec. 305.51; 42 U.S.C. Sec. 9612(b)(4)(G).

[202] 29 U.S.C. Sec. 1401(b)(2), (c).

[203] Washington Star Company. v. International Typographical Union Negotiated Pension Plan, 729 F.2d 1502 (D.C. Cir. 1984).

[204] IAM National Pension Fund Benefit Plan C v. Stockton TRI Industries, 727 F.2d 1204 (D.C. Cir. 1984).

[205] Id. at 1207.

[206] Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), cert den. 403 U.S. 923 (1971).

[207] Local 2578 AFGE v. GSA, 711 F.2d 261, 267 (D.C. Cir. 1983).

VI

CONCLUSION WITH RESPECT TO ADMINISTRATIVE ARBITRATION

Some of the administrative arbitration programs track their private sector analogs quite closely. The Commodity Futures Trading Commission's program, for example, applies to cases where time and transaction costs probably outweigh the need for procedural rigor, and the decisions are final.[210] Other programs, however, do not fit so well. The FIFRA program, for example, has the finality normally accorded arbitration, but it would appear that at least in some instances a large amount of money would be at stake and there are no guidelines for how the decision will be made. Moreover, that lack will probably not be rectified by the expertise of the arbitrator. Some norm -- whether through statutory prescription, agency rule, or developed common law -- would be in order. Were it established, the matter would then be better suited for arbitration since it would be more a matter of accounting or otherwise applying existing criteria. In either event, the margin for error would be substantially reduced. As it stands, any need for expedition probably does not outweigh the need for a standard.

Most of the administrative arbitration programs have two significant differences between them and traditional arbitration: First, this use is not voluntary, either before or after a dispute has arisen, but rather it is the only available means of making the decision.[211] Second, the greatest difference between most of the administrative arbitrations and private sector commercial arbitration is that the arbitral award is subjected to a scope of judicial review very similar to that of an administrative action, even when the award itself is not an agency order.[212]

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[208] Mandatory arbitration seems inappropriate except in those cases when the benefits of a trial type hearing are clearly and substantially outweighed by the need to (1) save time or other transaction costs or (2) have a technical expert resolve the issues. Otherwise, the "arbitration" is really stripped clean adjudication and the hallmark of arbitration -- its voluntariness -- is lost.

[209] Devine v. White, 697 F.2d 421 (D.C. Cir 1983).

[210] Compare this with the criteria at notes 63-67.

[211] Moreover, this relationship between the courts and the arbitration is different from that of typical court annexed arbitration where there is a trial de novo before the court, sometimes with disincentives against frivolous appeals.

Even though each program differs from the others, what seems to be evolving is a form of "administrative arbitration" in which the agency is at best passive. The adjudication -- in the form of the arbitration -- is outside the agency, but the relationship between it and the court is similar to that of the court and an agency with respect to informal adjudication. Once that is recognized, it provides a new tool for addressing a range of issues that do not need the full rigor of APA trial type hearings but more judicial oversight than customarily applied in arbitration. Most seem to contemplate that the decision itself will be relatively narrow and able to apply existing, well defined standards.[213]

Some of the other programs are only variants of the modified procedure that have been used previously.[214] In these, there is very little that is new. In the others, however, an interesting hybrid has been born that may have potential for substantial growth.

Unfortunately, "arbitration" is a sufficiently pliable term that it can be used to describe virtually any process in which a third party makes a decision. It would be helpful if there could be concurrence on some minimal criteria a program must have before legitimately being called "arbitration" even in the administrative sense. A first cut at that might be:

- abbreviated discovery;
- parties' participation in the selection of the arbitrator;
- application of a pre-existing norm that is defined by either statute or a rule issued by the implementing agency;
- once norms are applied, discretion is relatively narrow;
- strict time limits for decision;
- abbreviated decision, with a discussion of its factual and legal basis but no findings;
- limited review, Arbitration Act or designated as "arbitrary and capricious" but with a recognition of the nature of the process as defined in

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[212] Some courts have said with respect to the PBGC program that the arbitration is a form of "exhaustion" of remedies that is a precursor to a judicial determination. See, e.g. Peick v. Pension Benefit Guaranty Corp., 742 F.2d 1247 (7th Cir. 1983). Even with this perspective, however, the arbitration is the assigned first step in the decision process.

[213] Superfund. Trustees of the Western Conference of Teamsters Pension Trust Fund v. Thompson Building Materials, Inc., 749 F. 2d 1396 (9th Cir. 1984).

[214] Edles, The Hearing Requirement in the 1980s, 31 Fed. Bar N and J 435 (1984).

the criteria.[215]

Since these procedures are more limited than those provided by the APA, the process should be used only where the general criteria of arbitration are met.[216]

VII
AGENCY OVERSIGHT OF PRIVATE DISPUTE RESOLUTION MECHANISM

Two basic, structural forms of administrative arbitration emerge from the preceding analysis: (1) Programs that are explicitly within the agency itself and are used to resolve issues that would otherwise be decided under the customary agency processes.[217] (2) Programs that decide issues that arise because of agency action, or closely affiliated with it, but which are not actually a part of the agency;[218] while distinct, they can be viewed in some ways as "associated" with the agency. A third model of administrative arbitration -- or, more accurately, administrative dispute resolution -- is where the agency supervises a dispute resolution mechanism ("DRM") that operates as a part of a private organization.

A number of programs require, or permit, private organizations to establish a forum -- a DRM -- for reviewing complaints or other issues that arise with respect to some particular activity. The circumstances are such that if such a program were not established, the agency itself might be required to hold a hearing to resolve the matters presented. Under these programs, the agency may specify minimal procedures that must be followed by the private organization[219] and it will review how well the process is working, but it does not typically sit in review of any individual decision.

The Magnuson-Moss Warranty Act[220] for example is administered by the Federal Trade Commission and encourages warrantors to establish procedures to resolve disputes concerning warranties fairly and expeditiously.[221] The Act requires the FTC to issue rules prescribing the minimum requirements for a DRM to qualify for special treatment. If such a program is established, a complaining consumer must first turn to it before proceeding to court or other remedy.[222] A DRM is required to be independent of warrantor; have procedures that minimize burdens on the consumer; be financed by the warrantor; and be designed to achieve the basic goals of speed and fairness.[223] These programs can obviously be massively large. The Better Business Bureau, for example, operates the program for some of the auto companies and processes in excess of a quarter of a million disputes over automobile warranties per year.[224]

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[215] Thus, the court should assure itself that the arbitrator applied the right norms and performed in accordance with the requirements, but it would not attempt to force the arbitrator to replicate either a judicial or APA trial type hearing. In either case, the benefits would be lost.

[216] See supra, at notes 63-67.

[217] MSPB, CFTC.

[218] FIFRA, Superfund, PBGC.

[219] For example, see discussion of Medicare procedures in text associated with notes 130-134, supra.

[220] 15 U.S.C. §§ 2301-2310.

[221] 15 U.S.C. §

[222] 15 C.F.R, § 703.

Programs such as these are caught in a dilemma. On the one hand the procedures used by the DRM must be sufficiently rigorous to provide confidence on the part of the users that they will receive a fair hearing. On the other hand, if the procedures are too stringent, there will be no incentive to establish them -- either because they would be too expensive to operate or because they would not offer an attractive alternative to other available means of resolving the disputes. The tension between the two needs is clear and has been the subject of controversy over the years.[225] Several states have become dissatisfied with the process and have passed "Lemon Laws" going beyond the FTC's minimal procedures.[226] The FTC has recently begun a negotiated rulemaking to review and revise its rules.[227]

What is needed for such a program is to strike the delicate balance of providing an incentive to establish a fair and effective program[228] and an incentive to use the process as opposed to others that may be available -- or to ensure that it is indeed fair and effective if those affected are forced to use it at least in the first instance.

The FTC also entered into a consent decree with General Motors in settlement of its allegation that GM had failed to notify customers of high failure rates of certain automobile components and that constituted a violation of Section 5 of the Federal Trade Commission Act.[229] Instead of fighting the matter through a trial type hearing before the agency itself and on through the courts, the Commission entered into an agreement with GM whereby it would establish a DRM -- the Better Business Bureau -- to determine whether a particular car is afflicted with the problems and what should be done to rectify the matter. Under the process, the BBB attempts to mediate an agreement between the dealer and the customer and, failing satisfaction at that point, the issue is arbitrated.

The process was criticized both on the grounds that a refund should be provided generally to **all** owners of the affected cars -- whether or not they displayed any of the symptoms -- and that the mediation entailed a burdensome extra step that would likely not prove effective since the customers had already tried and failed to reach agreement with the company. BBB has reported that nearly 90% of the cases in one test sample were settled by mediation, however.[230]

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[223] Appendix III.

[224] Testimony of Dean Determan at ACUS Hearings, supra, note 49.

[225] See, Rossi, Incentives for Warrantor Formation of Informal Dispute Settlement Mechanisms, 52 U.S.C. L. Rev. 235 (1978); Greenburg and Stanton, "Business Groups, Consumer Problems: The Contradiction of Trade Association Complaint Handling," in L. Nader, No Access to Law (1980) at 193.

[226] E.g. Connecticut.

[227] 51 Fed. Reg. 5205 (Feb. 12, 1986).

[228] One person who is familiar with the effect of the Magnuson-Moss Act's "exhaustion" requirement argued that it was often not an incentive at all because it raised other forms of legal uncertainty and potential liability.

[229] In the Matter of General Motors Corporation, Dkt. No. 9145; see Appendix III.

Another major example of an agency's oversight of private dispute resolution mechanisms is the Securities and Exchange Commission relationship with the DRM's of the self-regulatory organizations such as the exchanges and the National Association of Securities Dealers.[231] The Commission must approve particular rules that are adopted by the SRO's, some of which deal with their mechanisms for resolving issues that arise through their actions. The Commission deferred developing rules establishing a nationwide system for resolving disputes between broker-dealers and their customers when the industry organized the Securities Industry Conference on Arbitration which in turn drafted a Uniform Code of Arbitration. The code has been adopted by all ten of the SROs and the Commission. As of 1984, the SRO's had resolved almost 5,000 cases.[232]

Other examples of the private DRMs that are overseen by agencies are the Medicare procedures discussed above[233] and medical ethics panels in hospitals.[234]

Supervised DRMs can provide particular, specific decisions that can serve in lieu of a general regulation.[235] As a defense against what it fears may be more intrusive regulation, industry frequently argues that it will provide needed safeguards, and hence that additional regulation is not needed. Even if the industry developed a satisfactory rule, it will not be effective unless those affected by it have some opportunity to enforce it and that will likely require a means for resolving disputes that arising under the program. These would entail determining whether, in a particular instances, the rule was broken; whether it applies at all; whether it takes into account appropriate considerations; what damages someone sustained; and so on, raising all the issues that arise in an administrative program. One means of dealing with this situation is to encourage the self regulation, but require the establishment of a DRM to resolve the issues that will inevitably arise. Otherwise, either an agency or court will have to resolve the issues or the program will provide a privilege and not right, which of course is very different from the regulation sought to be forestalled.

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[230] Testimony of Dean Determan at ACUS Hearings, supra note 49. The process has been controversial however. See, FTC, Consumer Group Clash over GM Program, Washington Post, p. E3 (October 25, 1985) which quotes the Center for Auto Safety as arguing "that the program is 'a disaster for consumers'." The Center alleged that the reviews of the program have not taken sufficient account of consumers who did not know about the program or who gave up before reaching a final resolution.

[231] See Appendix III for a fuller discussion.

[232] Katsoris, The Arbitration of a Public Securities Dispute, 53 Fordham L. Rev. 279, 284 (1984).

[233] See text accompanying note 130-134 supra.

[234] See, e.g., 50 Fed. Reg. 14,878 (1985) for regulations that implement the Child Abuse Amendments of 1984, P. L. 98-457.

[235] Harter, Dispute Resolution and Administrative Law, supra, note 76.

Several issues need to be considered and balanced when establishing a DRM that is overseen by an agency: What the incentives are to establish the program in the first place -- why would the private organization want to do it; what are the alternatives to doing so. Secondly, why would those affected, such as consumers, want to use it instead of some other process available. Or, if its use is mandatory, then the agency will need to assure the public that minimally acceptable procedures will be followed.[236] Finally, the agency needs to develop an enforcement mechanism by which it will oversee the execution of the processes. That generally means the agency not an individual appeal, but that it will review how well the system is working overall to determine whether the minimal procedures are being met and whether the procedures should be modified.

VIII
MINITRIALS

Its creators called it an "information exchange", but a New York Times headline writer in August 1978 found "mini-trial" to be more descriptive and the name stuck. The writer was reporting the quick settlement procedure designed by lawyers to untangle years of litigation in a patent case involving TRW, Inc. and Telecredit, Inc.[237]

The minitrial is a flexible, voluntary alternative means for the resolution of complex disputes successfully used by businesses, governments, and various interest groups. The minitrial was developed with the guiding hand of the Center for Public Resources, a non-profit organization formed in 1979 by a group of general counsel of well known Fortune 500 corporations. The new procedure has made advances in commercial and consumer dispute contexts where reduction in litigation expense is a major goal, and the idea has begun to spread to a wider segment of the bar including the government contract field. NASA, the government pioneer in the program, used a minitrial procedure to settle a multimillion dollar satellite contract dispute with Spacecom and TRW.[238] The Justice Department has run a minitrial pilot program in certain military procurement cases, and the Army Corps of Engineers has established a pilot minitrial program in several of its regions.

Minitrial Procedure.

The minitrial, sometimes referred to as a mini-hearing to indicate the relatively informal nature of the process, is a highly abbreviated litigation process in which litigants present the heart of their case to senior officials of the other party who have authority to settle. "The primary purpose of the minitrial is to set a stage and create a momentum for settlement."[239] Typically the process involves the "exchange of briefs or position papers with supporting documents, oral presentations of facts and law to senior officials of the opposing parties, some opportunity for questioning, and negotiation by the senior officials to attempt to settle the dispute."[240] An advantage of the minitrial is that it focuses the attention and energy of executives on both sides of the dispute and forces them to participate directly in the negotiated settlement. Another desirable feature of the minitrial is its flexibility: the parties can tailor the essential elements of the procedure to fit the litigation at hand.

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[236] What should be minimally required must necessarily depend on the nature of the questions to be resolved. Thus, they process will depend on the subject matter.

[237] "Alternatives to the High Cost of Litigation", CPR, N.Y., N.Y., Special Issue 1985, p. 3.

[238] 44 Federal Contracts Report 589.

Parties are motivated to adopt the minitrial procedure by several factors--avoidance of high litigation costs, avoidance of adverse outcomes of litigation, the need to return employees supporting the litigation to more productive activities, and the desire to maintain a reasonably cordial relationship between litigants who may wish to continue doing business together in the future.[241]

The parties typically negotiate the groundrules at the outset and often suspend or curtail discovery. This would suggest to parties, who have an eye on the possibility of suspending normal litigation and attempting the minitrial, to make a careful schedule of depositions.[242] Because the minitrial may be elected before the end of discovery, the parties should depose those individuals whose testimony will have the most substantial impact.[243]

The minitrial is wholly voluntary so the parties must genuinely want to see it used as a means of settlement for it to succeed.[244] Obviously the threshold question for the parties to consider is whether the nature of their dispute lends itself to the mini-hearing process.[245] One of the developers of the minitrial offered the following observation on the decision of whether to use the process:

> It may not be appropriate where precedent-setting issues of law and witness credibility are the central issues and where the client has made a business determination to roll the dice. It can, however, be tailored to fit most large scale disputes involving mixed questions of law and fact, particularly where issues of science and technology are important. For most large, entrenched cases, the minitrial offers a better alter-

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[239] Minitrial Successfully Resolves NASA-TRW Dispute, The Legal Times, Monday, September 6, 1982, p. 17.

[240] Parker, Douglas M. and Phillip L. Radoff, The Mini-Hearing: An Alternative to Protracted Litigation of Factually Complex Disputes, 38 The Business Lawyer 35, November 1982.

[241] Minitrial supra 239 at 17.

[242] Id.

[243] "Alternatives to the High Cost of Litigation", CPR, N.Y., N.Y., Special Issue 1985, p. 3.

[244] Parker and Radoff, supra note 240 at 42.

[245] Olson, Dispute Resolution: An Alternative for Large Case Litigation, 6 A.B.A. Litigation Sec. J. 22 (1980). cited in Parker and Radoff, supra note 240 at 42.

native to the more common practice of one side and then the other occasionally tossing out a settlement offer.[246]

Two obviously related questions to consider are whether one side will have gained a tactical advantage if settlement is not reached and what point in the litigation process will be the most appropriate to conduct the minitrial.[247] Parties should consider that despite a failure in settlement following the minitrial, the process itself aids the parties in preparing and focusing the issues of their cases for future full-blown litigation.

If the parties decide to use the minitrial, an important consideration is whether to use a neutral advisor to moderate the discussion.[248] Most, but not all, minitrials employ a neutral advisor with special expertise (often a retired judge) to "supervise the discussion and to furnish the parties with a nonbinding evaluation of the most likely outcome of the dispute were it to wind up in court."[249] In cases of highly technical disputes, some parties have found that the introduction of a neutral advisor causes additional expense and possible delay because the advisor must become sufficiently educated.[250] In the NASA case explained below, for example, the parties never seriously contemplated using a neutral advisor.[251]

Relatively short written briefs discussing the applicable facts and law are usually exchanged prior to the minitrial.[252] More comprehensive briefs are sometimes helpful or necessary in narrowing the issues in advance of oral presentations.[253] In the NASA case, for example, the briefs were rather lengthy and also were followed by a simultaneous exchange of written questions to be responded to at oral presentation.[254]

The hearing itself usually lasts no more than two days for the parties to state their cases (excluding extraneous issues), offer evidence for their positions, and field questions.[255] Presentations can be made by lawyers, technical experts,

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246. Parker and Radoff, supra note 240 at 42.

247. Id. p. 35.

248. Id. p. 43.

249. "Alternatives to the High Cost of Litigation", CPR, N.Y., N.Y., Special Issue 1985, p. 3.

250. Parker and Radoff, supra note 240 at 43.

251. Id.

252. Id.

253. Id.

254. Minitrial supra note 239 at 13.

255. Alternatives to the High Cost of Litigation, CPR, N.Y., N.Y., Special Issue 1985, p. 3.

or a combination of both.[256] At the conclusion of the hearing, the negotiating officers go off on their own to settle the dispute, with legal advisors standing by for consultation. If they reach an impasse, and have proceeded before a neutral advisor, the parties can request an advisory opinion on the likely outcome. The advisory opinion often acts as a catalyst towards settlement.[257] With or without a neutral advisor, any deadline set by the parties can contribute to lending a sense of urgency to resolving the dispute.[258]

Use by Government Agencies.

The growing movement in corporate and consumer disputes to save time, money, and judicial resources through alternative dispute resolution techniques -- such as minitrials -- has slowly reached the government setting.[259] Exploration of the new technique should be helpful since the government has experienced the same rising litigation costs and interminable court delays as private parties. Several perceived statutory and practical obstacles have impeded the government in using creative dispute resolution methods, however. The minitrial may be particularly well suited to overcome these obstacles.[260]

One obstacle which makes government contract disputes distinct from commercial litigation is the elaborate disputes resolving statutory procedure mandated by the Contract Disputes Act of 1978.[261] The statute applies to all contracts entered into after March 1, 1979. A key provision of the statute mandates that all government contracts include dispute clauses which set forth procedures by which disagreements relating to the contract must be resolved.[262] The procedure requires the government to make a final written decision concerning the disagreement with the contractor including all the facts and legal conclusions which led the government to deny the contractor's claim.[263] Upon receipt of the government's final decision, the contractor has three options: (1) acquiesce; (2) appeal the decision to an agency board of contract appeals; or (3) sue in the U.S. Claims Court.[264]

Whether these statutory procedures are exclusive is a question which raises an impediment to the government's use of the minitrial technique.[265] For example, in Davis and Moore,[266] the Interior Board of Contract Appeals held that the government cannot submit to binding arbitration because of conflict with the statutory procedures.[267] The government's authority to settle and to devise means of settling, however, has never been doubted because in fact a basic purpose of the Contract Disputes Act was to promote more efficient resolutions of disputes.[268]

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[256] Parker and Radoff, supra note 240 at 43.

[257] Cong. Rec. S14707 (November 1, 1985).

[258] Parker and Radoff, supra note 240 at 44.

[259] Crowell and Moring Discussion Paper, Alternative Resolution of Government Contract Disputes, p. 1.

[260] Minitrial supra note 239 at 21.

[261] 41 U.S.C. §§ 601-613 (Supp. IV 1980).

[262] Minitrial supra note 239 at 19.

[263] Id.

[264] Id.

A second serious obstacle facing government use of expedited settlement is "the natural inclination of agency officials to follow the book, in resolving disputes, thereby theoretically avoiding congressional and public criticism."[269] A plethora of organizations outside the agency review and second-guess any settlement. Potential reviewers and possible critics include oversight committees of Congress, audit teams from the General Accounting Office, and the agency inspectors general,[270] as well as the general public. The use of minitrials may actually ease this problem, however. The process requires a written record clearly documenting the issues of settlement, potential litigation risks are clearly described by the legal positions set forth in the briefs, and the formality of the procedure itself may lessen criticism."[271]

A third perceived constraint unique to the federal contracts context is the question of settlement authority. Federal agencies have a rigid chain of command and settlements must often be approved by the legal, financial, procurement policy, and technical divisions of an agency.[272] Tentative settlements are often upset by subsequent internal agency review. The minitrial procedure may also obviate much of this problem. In preparation for the minitrial, the government is forced to define the authority of the negotiation and the acceptable negotiating position. The advance approval and "written authorization from the head of the agency, empowering the representative on behalf of the agency to reach a settlement, reduces the opportunities for overturning the settlement."[273]

Finally, a related problem for the government is the question of settlement funding requirements.[274] A negotiating officer for the agency obviously cannot ultimately make settlement without the funds to cover it. Minitrial requirements in some ways relieve these problems by involving senior officials who have the authority to approve "re-allotments".[275] Re-allotments can be made within the agency to cover the financial needs for a particular settlement.

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[265] Id.

[266] IBCA No. 1308, 81-2 BCA 91 15,418.

[267] Minitrial supra note 239 at 21.

[268] Id. S. Rep. No. 3173. 95th Cong., 2nd Sess. 119781.

[269] Crowell and Moring, p. 1.

[270] Minitrial Successfully Resolves NASA-TRW Dispute, The Legal Times, Monday, September 6, 1982, p. 21.

[271] Id.

[272] Id.

[273] Id.

[274] Crowell and Moring, supra note 259 at 6.

Despite the putative obstacles mentioned above, the government has already begun exploring alternative dispute resolution ("ADR") techniques, such as minitrials, because of several factors relating to litigation, some unique to government and some particular to all litigants.

The most obvious catalyst for exploration of alternative resolution techniques is the rising cost of litigation and the court delays which face all private parties and with perhaps even greater force the government.[276] Disputes between agencies and their suppliers has been the natural result of an increase of federal procurement spending.[277] In fiscal year 1982, for example, 1,273 cases were filed with the Armed Services Board ("ASBCA"), the largest administrative board of contract appeals, while only 974 cases were filed the previous year.[278] Only 95 of the 1,594 pending cases in 1982 were being processed under optional expedited procedures.[279] Although the administrative appeals boards were designed as a streamlined alternative to court litigation, the costs are still substantial because of the formal procedures adopted by the boards.[280] Minitrials have resulted in substantial savings for the parties. In the NASA case, which was the first minitrial used in the context of government procurement, one estimate suggested that the savings "were probably more than $1 million in legal fees alone."[281]

Another factor making the minitrial particularly attractive to the government is related to the required procedures of the Contract Dispute Act of 1978 itself. The required disputes clause in government contracts requires that federal suppliers continue performance, notwithstanding a dispute with the government. The contractor may not stop work and immediately challenge in court an agency order or contract interpretation.[282] Another mandatory clause in all government contracts, the "changes clause", also allows the government to insist upon changes to the contract during performance.[283] Those allowable government changes would of course be considered breaches of contract in a commercial setting.[284] In exchange for those two conditional clauses, the government must pay a fair amount for additional work.[285] Problems arise, however, when the government does not consider one of its directions as being a "change" in the contract. The contractor must continue to perform and leave for later the question of who will bear costs.[286] An efficient, expedited resolution of the dispute by minitrial settlement will lessen the adversarial roles between the government and its supplier -- "a phenomenon that serves the ongoing business relationship of the parties to government contracts."[287]

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[275] Minitrial supra note 239 at 21.

[276] Crowell and Moring, supra note 259 at 2.

[277] Id.

[278] Id.

[279] Id.

[280] Id., at 3.

[281] Eric D. Green, Boston University Law School Professor in 44 Federal Contracts Report 591, September 23, 1985.

[282] Crowell and Moring, supra note 259 at 4.

[283] Id.

[284] Id.

When and for Which Cases, Should the Government Consider Using Minitrials?

In its pilot program for using minitrial techniques to resolve disputes, the Justice Department has directed government attorneys that cases selected for minitrial should be at an early stage of litigation.[288] The cost savings of a minitrial held after discovery has already been completed may not be significant.[289] In addition, the case should probably involve more than $250,000 to justify expenditure of at least a full day's time of high-level company executives and government officials.[290]

The minitrial technique lends itself well to cases involving highly technical concepts and disputes involving mixed questions of law and fact.[291] The NASA case was a good candidate to test the minitrial for this reason. The government also may wish to consider using the minitrial method in cases involving classified defense contracts. The informal settlement can be conducted without an evidentiary hearing in open court that might be harmful to the national security.[292]

The minitrial is likely less appropriate where witness credibility is a major factor. The technique is also probably not justified in cases where questions of law can quickly be resolved through summary judgment.[293] Finally, the minitrial would not be extremely effective for the government in litigation undertaken to implement policy.[294]

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[285] Id.

[286] Id.

[287] Minitrial Successfully Resolves NASA-TRW Dispute, The Legal Times, Monday, September 6, 1982, p. 19.

[288] 44 Federal Contracts Report 591.

[289] Id., at 589.

[290] Id., at 590.

[291] Id.

[292] Crowell and Moring, supra note 259 at 8.

[293] Id.

[294] Oliver, Dale E., Crowell and Moring, Alternative Dispute Resolution in Government Litigation; Remarks before the First Judicial Conference of the United States Court of Appeals for the Federal Circuit, p. 1.

The following is a brief review of two government cases successfully resolved through use of minitrial techniques.

NASA Minitrial.

The first reported use of the minitrial technique to resolve a government contracts dispute was in 1982 when NASA, Space Communications Co. (Spacecom -- prime contractor), and TRW, Inc. (TRW -- the subcontractor) settled a multi-million dollar technical dispute.[295] The dispute involved one of NASA's communications satellite programs.

Nature of the Dispute. In December 1976, NASA awarded a major satellite contract to Spacecom for the production of a tracking and data relay satellite system (TDRSS) and related services to be provided over a ten year period.[296] The satellites were to be deployed in orbit by a space shuttle and provide a telecommunications link to an earth station.[297] The contract had an initial price of $786 million.[298]

TRW, Inc., the principal subcontractor, was responsible for providing system engineering, building the communication satellites and providing the necessary software.[299]

By the fall of 1981, the commencement of the TDRSS services had been rescheduled because of delays in production of the space shuttle; the contract price had nearly doubled because of the delays and program changes; and several contract disputes had arisen between Spacecom and NASA.[300] The disputes, ultimately resolved by the minitrial, arose when NASA issued two letters of direction to the contractors in early 1979. The letters sought to obtain for NASA certain capabilities that it believed were within the scope of the contract.[301] Spacecom and TRW maintained that the instructions constituted new work which entitled them to increased compensation.[302] Spacecom and TRW appealed the final decision of the contracting officer to the NASA Board of Contract Appeals. The consolidated appeal was one of the largest ever filed with the Board.[303] These appeals commenced the litigation.

Scope of Litigation. The litigation involved a series of complex issues

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295. 44 FCR 590.

296. Minitrial supra note 239 at 13.

297. 44 FCR 590.

298. Parker and Radoff, supra note 240 at 37.

299. Minitrial supra note 239 at 13.

300. Parker and Radoff, supra note 240 at 37.

301. 44 FCR 596.

302. Minitrial supra note 239 at 13.

303. 44 FCR 596.

relating to the interpretation of the TDRSS performance specification in a variety of highly technical respects.[304] "The merits of the issues involved intricate questions of computer capability, electronics, and the laws of orbital mechanics, as well as traditional questions of contract interpretation."[305]

The complaint and answers were filed in September 1979 and February 1980, respectively.[306] Shortly after discovery began, the parties suspended the proceedings for three months to pursue traditional settlement negotiations.[307] Settlement failed. The parties renewed litigation and engaged in massive document discovery involving the reproduction of approximately 33,000 pages of government files and 72,000 pages of the contractors' files.[308]

Depositions commenced in the summer of 1981.[309] Although the contractors sought 11 depositions and the government sought 43, only 5 depositions actually took place.[310] By September, the highly technical examinations of the witnesses "consumed 3100 pages of transcript."[311] The widening scope of discovery required the Board to push back the hearing date several times and it was estimated that trial was still at least a year away.[312]

In the fall of 1981, Spacecom approached NASA with the suggestion to undertake settlement discussion again. The parties agreed on a minitrial after certain preconditions were set by the parties: (1) the contractors would submit a cost proposal with a breakdown of the six major issues of appeal; (2) each side would give written authority to settle to an appointed negotiator; (3) deadlines and rules of conduct would be agreed upon; and (4) discovery would be suspended during the minitrial.[313]

Motivations to use the Minitrial. First, both parties were concerned with costs. They had already found it necessary to conduct detailed discovery and anticipated substantial additional discovery. The parties had proposed calling for the depositions of forty-five additional government and contractor witnesses over the next ten months.[314]

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[304] Parker and Radoff, supra note 240 at 37.

[305] *Id.*, p. 38.

[306] *Id.*

[307] *Minitrial* supra note 239 at 13.

[308] Parker and Radoff, supra note 240at 38.

[309] *Id.*

[310] *Minitrial* supra note 256 at 13.

[311] Parker and Radoff, supra note 240, at 38.

[312] *Minitrial* supra note 239 at 13.

[313] *Id.*, p. 13.

[314] Parker and Radoff, supra note 240 at 38.

Second, the parties were motivated to tighten the schedule. A trial date was not even in sight with delays attributable to the complexities of the case, problems in coordination between the prime and subcontractor, the difficulty of securing people for litigation who were also needed in the TDRSS program, and the shortage of people allocated to the case by the government.[315]

A third concern of both NASA and the contractor was the uncertainty of result. Both parties were aware that the difficulty of making a clear, comprehensive and persuasive presentation of such complex issues created an unusual uncertainty in the outcome.[316]

Another motivation for the minitrial was the parties' need for continued cooperation. Litigation can strain business relations between parties. In this case, the parties were required to continue working together to deploy the satellite successfully, a national asset. They also wanted to release key personnel from the litigation process to resume channelling their energies into the program.[317]

Finally, the parties felt the need to address the merits and involve senior officials. Spacecom realized that previous settlement discussions had not addressed the merits of the issues nor involved face-to-face meetings of senior management.[318] It felt that NASA's willingness to invest such time and money into discovery suggested that NASA was persuaded that the government's case was meritorious.[319] The contractors felt that a settlement could only be reached if, through a minitrial, senior management of NASA was exposed to the contractor's best case and both parties were able to address the merits.[320]

The Procedure. Before proceeding, the parties agreed that:

- Litigation would be stayed during the minitrial,[321] but would resume if no settlement were reached.
- The contractors would submit a formal claim covering cost of performance and proposed allocation of cost of each legal issue.[322]
- The parties would simultaneously exchange briefs setting forth their factual and legal positions. All cited documents were to be included in

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[315] Crowell and Moring, supra note 259 at 8.

[316] Parker and Radoff, supra note 240 at 39.

[317] Id.

[318] Id.

[319] Id.

[320] Id.

[321] Id., p. 40.

[322] Id.

appendices.[323] No reply briefs would be filed.

- Shortly after the briefs were exchanged, each party would submit questions to be addressed by the other during its oral presentation.[324]

- The trial was to be one day. Each side was to have three hours to make a presentation and could use whatever combination of lawyers and engineers it thought appropriate in making the presentations.[325]

- Presentations were to be made to senior officials representing each party. An associate administrator of NASA and the director of Goddard Space Flight Center for NASA; a VP of TRW and the president of Spacecom, for the contractors. Only senior officials would ask questions.[326]

- Settlement negotiations would then begin.

In the actual minitrial, the oral presentations were made exclusively by lawyers.[327] Also, the parties chose not to use a neutral advisor because of the complex technical issues in dispute.[328]

Settlement negotiations began the day after the hearing "behind closed doors" at NASA headquarters.[329] Only the four principal negotiators directly participated in the negotiations but had advisors and legal counsel stand by to discuss positions.[330] The parties had agreed to a groundrule of limiting the settlement negotiations to a single day but decided that an additional day was justified by the progress made. The parties settled after their second day of face to face meetings and reached agreement on the claim as well as unrelated disputes.[331] All claims and related issues amounted to well over $100 million.[332]

Army Corps of Engineers Use of the Minitrial

In the last two years, the Corps of Engineers has used the minitrial procedure twice to resolve construction contract claims.[333] Spokesmen for the Corps have said that the type of case most suited for a minitrial is one involving a "highly complex factual dispute in which the contractor's arguments have some merit."[334] The Corps looks for cases in which there is a possibility that a board of contract appeals will sustain the contractor's position where there is room for the government to settle.[335]

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[323] Id. NASA submitted a 64 page brief with a 43 document appendix, while the contractor's brief consisted of 81 pages and an appendix of 79 documents.

[324] Minitrial supra note 239 at 13.

[325] Id.

[326] Id.

[327] Id.

[328] Crowell and Moring, p. 10.

[329] Parker and Radoff, p. 41.

[330] Minitrial supra note 239 at 17.

[331] Id.

[332] Id.

Industrial Contractors. The Corps first used the minitrial to reach settlement on a $630,000 construction contract claim.[336] The claim was made by Industrial Contractors, Inc. that the government had "improperly accelerated performance on its construction contract."[337] The parties agreed to use a minitrial. The contractor's president and the Corps' division engineer each presented his claim in three and one half hours.[338] Following an appraisal of their cases by a neutral advisor, former Claims Court Judge Louis Spector, the parties settled after 12 hours of negotiation.[339]

Tenn-Tom. The second case in which the Corps successfully used the minitrial technique to resolve a dispute involved a $61 million construction claim by Tenn-Tom Construction.[340] The Corps awarded a contract to construct part of the Tennessee-Tombigbee Waterway, to Tenn-Tom, a joint venture of Morrison--Knudsen Co., Brown and Root, Inc., and Martin Eby Construction Co.[341] The contract was for excavation of 95 million cubic yards of earth.[342] The dispute arose when the contractor sought a $44 million equitable adjustment based on alleged differing site conditions. The contractor had experienced performance difficulties because of drainage problems on site.[343] After receiving written denial of the claim by the contracting officer, the joint venture appealed to the Corps of Engineers Board of Contract Appeals,[344] increasing the claim to $61 million due to interest.

The parties agreed to a minitrial and chose Professor Ralph Nash, a GW professor, as a "neutral advisor."[345] The trial was held in Cincinnati on June 12-14, 1985.[346] The principal officers for the parties were J. K. Lemley, Senior Vice President of Morrison-Knudsen, for the contractors, and Division Engineer Brig. Gen. Peter J. Offringer, for the Corps.[347] The parties presented their cases on consecutive days, with a third day devoted to presentation of evidence concerning quantum and for remaining questions.[348] By agreement, the parties reconvened on June 27, for presentation of further evidence and more questions. They settled the next day.[349] The government agreed to pay Tenn-Tom $17.25 million in exchange for a release of all prime contractor and subcontractor claims under the contract.[350]

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[333] 44 FCR 502; 43 FCR 257.

[334] 44 FCR 502.

[335] Id., p. 503.

[336] 43 FCR 257 in Id.

[337] Id.

[338] Id.

[339] Id.

[340] In Re Tenn-Tom Construction, memorandum of settlement agreement, 8/23/85. 44 FCR 502.

[341] 44 FCR 500.

[342] Id.

[343] Id.

[344] Id.

IX
SETTLEMENT TECHNIQUES

Agencies use a variety of techniques that are less structured and less formal than minitrials to encourage the settlement of contested issues. The unifying principle of all the processes is that the parties make the decision themselves through a negotiated agreement. That is, these procedures are unlike arbitration[351] where someone makes a decision and imposes it on the parties.

Need for Structure to Facilitate Settlements

Settlements happen all the time. Most, no doubt, occur by "doing what comes naturally." While successful in resolving many cases, an ad hoc approach does not recognize settlement as a specific process that can result in both more and better settlements.[352] Explicit recognition of their potential by the development of procedures to induce them in appropriate situations[353] and to provide

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[345] Id. at 503.

[346] Id.

[347] Id.

[348] Id.

[349] Id.

[350] Id.

[351] To a very real extent, however, non-binding arbitration is a settlement techniques since the parties return the authority to make the final decision after award.

[352] Testimony of Erica Dolgin of Environmental Protection Agency at ACUS Hearing supra note 49. Ms. Dolgin observed that settlements have a life span -- a beginning, a middle, and an end -- and that the procedures and skills required for each phase may differ.

[353] While it should be unnecessary to point out, but given the enormous attention paid recently to managing dockets and using ADR techniques as a means of reducing the backlog of trials, it bears emphasizing that not all

(continued...)

for the participation of those who would be affected can help agencies handle their caseloads and make fully satisfactory decisions with fewer resources than would a more formal process. It is, therefore, helpful to establish procedures to enhance the settlement process. Moreover, settlement procedures can help alleviate problems peculiar to the government in settling cases.[354]

As in any bureaucracy, the distance between those on the line and those with decisional authority can be a major inhibition to negotiating a settlement. The employee who is handling a particular matter may lack guidance as to the agency's policies concerning settlement, and hence may be reluctant to engage in discussions simply because he or she is unclear whether the agency has the power to settle[355] or as to what would be acceptable.[356] Or, as a result of the same

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353.(...continued)
cases can or should be settled. The thesis of this paper is that trials are one, but only one, means of making decisions, and that other techniques may be more appropriate in particular circumstances. ADR techniques are a positive means of resolving important issues, not a second best alternative to the "real thing."

Formal decisions become public goods that guide future conduct and provide a means of ensuring that the public welfare is achieved. For example, if someone was the victim of severe discrimination, the public may demand a full vindication of the violation of the public's standards, even though the individual may be willing to settle for less. There is, therefore, some public policy against settlement, although its full reach and reason is not always clear.

The result, however, is that agencies and parties should always consider the matter in perspective and recognize that some issues should be resolved in a formal, public manner because they involve issues transcending the immediate parties. See Edwards, Fiss, and Schoenbrod, supra note 66. On the other hand, there seems to be no particular reason for believing a federal judge is the only one able to pronounce justice in such cases and that properly structured and supervised settlements may often do a better job of rectifying the problem.

[354] Rosin, EPA Settlements of Administrative Litigation, 12 Ecology L. Q. 363 (1985).

[355] Former Attorney General William French Smith observed,

> government lawyers sometimes are reluctant to use alternative means of dispute resolution because it is not clear whether Congress has authorized such means. Where Congress has, it still may be unclear who in the agency has power to approve their use or how an agency pays for the nonjudicial forum.

Smith, Alternative Means of Dispute Resolution: Practices and Possibilities in the Federal Government, 1984 Mo. J. of Dis. Res. 9, 21.

[356] Richard Robinson, Director, Legal Enforcement Policy Division, Environmental Protection Agency, testified at the ACUS Hearings that settlement techniques are not used frequently because there are too many layers involved in getting permission to use a new approach and, even if granted, the official (continued...)

phenomenon, a proposed settlement may be subjected to multiple layers of review within the agency.[357] In that case, those with whom the agency is negotiating may be reluctant to be forthcoming since the tentative agreement may be upset as it wends its way through the agency. People negotiate to reach a binding resolution of the controversy. Hence, if the agreement that was crafted after days of pressing discussions does not have a fairly good chance of being accepted, parties have a significantly lessened incentive to bargain.

These problems with settlement can be addressed by providing those who would normally negotiate with the public with guidelines as to the agency's policies concerning settlements.[358] Another means of addressing similar problems is for the agency to make lines of authority clear and provide a means for involving policy-level officials in the decisions as they mature, so that once the agreement is struck there is a reasonable likelihood that it will be upheld.

Another inhibition to settlements -- one certainly **not** limited to government -- is that the parties become overly convinced of the strength of their respective cases. Since each believes he or she has a winner, and hence a high BATNA, they also see little to be gained in settling, unless of course the other side sees the light and capitulates. That is not conducive to settlement. Thus, another aid in the settlement process is to provide some sort of "reality check" on all parties. This is some means of helping a party assess the strength of its case in a relatively honest, straight forward way so that they can put its settlement potential into perspective. The minitrial, for example, is designed to use a neutral advisor who will render an informal, non-binding opinion should the executives fail to negotiate an agreement.[359]

Yet another problem facing government officials in settling cases is debilitating second guessing.[360] Direct negotiation among those affected customarily

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356.(...continued)
is likely to feel he or she will not receive enough credit for using a new approach. Thus, it is easier and safer to stick with traditional litigation. Indeed the government has never used ADR in an enforcement case.

[357] See discussion supra at note 272.

[358] Testimony of Kay McMurray, Director, Federal Mediation and Conciliation Service, at ACUS Hearings, supra note 49.

The Attorney General recently issued guidelines to executive branch agencies concerning settlements. It cautions agencies against yielding future discretion in settlements and provides examples of the types of settlements the Department of Justice will oppose. While perhaps negative in tone, it does provide agencies with guidance they can take into account when initiating settlement discussions. It is far better to know of the limitations at the early stages of negotiation than having a fully developed tentative agreement knocked down.

[359] See discussion supra at note 33.

[360] Those who manage the government's litigation may also be reluctant to use informal dispute resolution processes because of a fear that they will be (continued...)

relies on the parties' self interest for its integrity; indeed, the ability of those affected to actually make the decision is one of the most attractive aspects of direct negotiations. Thus, whether or not the agreement is a "good deal" for any one party can be judged by comparing it to that party's goals and what might have occurred if some other process for reaching a decision were followed. The difficulty with using direct negotiations when the government is a party is that the government's own goals may sometimes be unclear. Thus, for example, it may not be clear in the abstract whether a settlement was wise under the circumstances because the government's case was weak, or the official wanted to achieve some other end,[361] or whether the settlement inexplicably gave too much away. The potential for second guessing an official can have a debilitating effect on negotiations in some controversial areas. In that case, it may be that the agency would want to establish a panel of senior officials or a group of neutral advisers,[362] publish the settlement in the Federal Register for comment,[363] or some other means to ensure the integrity of the decision and to curtail pernicious second guessing.

Overview of Techniques[364]

The Environmental Protection Agency drafted, but has not published rules to encourage the negotiation of test rules under the Toxic Substances Control Act by providing procedures leading to a "consent agreement" that will have the effect of an EPA rule.[365] The proposal provides "EPA intends to use enforceable consent agreements to accomplish testing where a consensus exists among EPA, affected manufacturers and/or processors, and interested members of the public concerning

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360.(...continued)
criticized. For certain issues, such as public health and safety, the perception remains with some that private, informal hearings are inadequate, and that public officials who allow such hearings may be abusing their power.

Smith, supra note 355, at 21.

[361] There is always the possibility that someone will attack a settlement as motivated by the government official's seeking beneficial employment or otherwise currying the favor of the one with whom he or she is settling.

[362] See, Railway Labor Act, § 2, Ninth; Switchmen's Union v. National Mediation Board, 320 U.S. 297 (1943).

[363] The Department of Justice and the Federal Trade Commission publish notices concerning proposed mergers.

In addition to providing information for the agency's consideration, the publication can also help diminish allegations of backroom deals since the world at large will know that the decision is being made and what its contours are.

[364] See Appendix I for a survey of settlement techniques used by administrative agencies.

[365] Draft of August 7, 1985 of a notice of proposed rulemaking.

the need for and scope of testing."[366] Procedures have also been recommended for using negotiation to resolve complex Superfund matters.[367] EPA has issued guidelines for settling enforcement actions.[368]

The Federal Energy Regulatory Commission uses as "settlement judge" to help the parties settle a case.[369] The Chief Judge has the authority to designate an ALJ who is not assigned to a case to meet with the parties in an effort to clarify and narrow the issue and to see if they can settle the matter. The settlement judge does not have the authority to impose a decision, and because the judge is not the one who will try the case, the parties are likely to feel freer to be more direct and open in attempting to reconcile their differences. One judge indicated that he was able to review the file and provide a fairly accurate appraisal of the case for certain types of matters, and that had a salutary effect on the parties by putting their case into perspective. To an extent, the settlement judge acts a bit like a mediator and a bit like the neutral adviser in a minitrial by giving his reaction to the case.

Agencies have also established a number of explicit mediation programs. The Secretary of Commerce mediates disputes under the Coastal Zone Management Act between a federal agency and the affected costal zone state.[370] The Office of Ocean and Coastal Resources Management mediates several disputes per year between state agencies and federally licensed activities. Complaints over age discrimination are mediated by the Federal Mediation and Conciliation Service,[371] and the Equal Employment Opportunity Commission seeks to reconcile differences over unlawful employment practices.[372] The Grant Appeals Board of the Department of Health and Human Services provides a "two track approach," one of which is mediation; this process is the subject of a separate, comprehensive study by the Administrative Conference.

The criteria for determining whether an issue is likely to be resolved through negotiation were developed in ACUS Recommendation 82-4.[373] While the recommendation itself focused solely on the prospects for negotiating regulations, the criteria are applicable to issues of public policy generally. Briefly stated, the criteria for deciding when a matter would lend itself to a negotiated solution are:[374]

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[366] Id.

[367] ACUS Rec. 84-4; Anderson, Negotiation and Informal Agency Action: The Case of Superfund, 1985 Duke L. J. 261 (1985).

[368] See, e.g., 50 Fed. Reg. 5034 (1985).

[369] Appendix I.

[370] Appendix I.

[371] For a discussion of FMCS's non-labor activities generally, see Barrett, The FMCS Contribution to Non-labor Dispute Resolution, Monthly Labor Review 31 (August 1985).

[372] 29 CFR 8 1601.24.

[373] Harter, Negotiating Regulations, supra note 1, Perritt, Negotiated Rulemaking in Practice, 5 J. Pol. Ana. & Mgt. 482 (1986).

- The number of interests that must participate in the discussions at any one time is limited to approximately 15-25; others can be accommodated by means of "teams" or caucuses".
- Each interest is sufficiently organized that individuals can be selected to represent it during negotiations, or several individuals together can span the range of interests.
- The issues are mature and ripe for decision; that is, they are sufficiently crystallized that the parties can focus on them directly.
- There is a realistic deadline; this may be an agency commitment to move forward on its own if sufficient progress has not been made in the negotiations.
- No party will have to compromise an issue fundamental to its very existence.
- The outcome is genuinely in doubt, in that no party can achieve its will without incurring an unacceptable sanction from some other party; thus, the parties have reached a stalemate or an impasse.
- The parties will commit themselves to negotiating in good faith (which is not to say that they have to agree to yield whatever other tools they have at their disposal to achieve their ends).

Many of these provisions have direct applicability to deciding whether it would be appropriate to settle a pending matter.

X
CONCLUSION: WHERE DO WE GO FROM HERE?

A prestigious panel of the American Bar Association, following an extensive study, found severe shortcomings in the administrative process:

> We share the general view that many administrative procedures are too slow, costly and cumbersome. As a result, vital economic interests concerned with capital formation, plant modernization and business expansion are severely handicapped, and reforms necessary for the protection of workers and consumers are too long postponed. These delays and excessive costs have resulted, in considerable part, from the fact that administrative procedures, initially developed as a safeguard

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[374] Harter, Regulatory Negotiation: An Overview, Dispute Resolution Forum, (Jan. 1986) at 4. See also, Cormick, The "Theory" and Practice of Environmental Mediation, 2 Envtl Prof. 24 (1980); Susskind & Weinstein, Toward a Theory of Environmental Dispute Resolution, 9 B.C. Envtl Aff. L Rev. 311 (1980); Raiffa, The Art and Science of Negotiation (1982).

> against the threat of regulatory abuse, have come to mimic the judicial process, with inadequate regard for the flexibility available under existing statutes. Improved procedures will serve all citizens, both as consumers and producers.[375]

Former Attorney General William French Smith echoed these concerns in terms of direct impact on the Federal Government:

> Increased use of adversarial procedures in the courts and administrative process has had serious consequences. Regulatory proceedings have become more lengthy and complex as a result of conflict between the government and private parties, and have all too often led to unnecessary and wasteful regulations. Moreover, lawsuits involving the government have become more numerous. The number of lawsuits in which the United States was a party grew by more than 155% in the last decade: from 25,000 new lawsuits a year in 1970 to 64,000 new lawsuits a year in 1980. The accompanying costs to the government have increased at an even greater rate, with legal expenses of federal agencies estimated to have more than tripled in the decade of the 70's. In a time of fiscal constraints, the government simply cannot afford these costs.[376]

Even without the shortcomings of an excessive reliance on trial type procedures, alternative means of dispute resolution may have positive benefits beyond alleviating caseloads and resulting delay. Another prestigious, diverse panel found in its report to the Department of Justice concerning courts but in terms equally applicable to agencies:

> Society cannot and should not rely exclusively on courts for the resolution of disputes. Other mechanisms may be superior in a variety of controversies. They may be less expensive, faster, less intimidating, more sensitive to disputants' concerns, and more responsive to underlying problems. They may dispense better justice, result in less alienation, produce a feeling that a dispute was actually heard, and fulfill a need to retain control by not handing the dispute over to lawyers, judges, and the intricacies of the legal system.[377]

The increased use of the full range of alternative means of dispute resolution by administrative agencies can, in appropriate circumstances, help address these problems. As former Attorney General Smith has also observed, "Federal officials have just begun to recognize the potential of alternative dispute resolution processes and only recently have they tried to apply these processes in resolving controversies in which the government is a party."[378]

Several things appear necessary to increase the beneficial use of dispute resolution techniques by Federal agencies. First is simply an explicit recognition

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375. American Bar Association, Commission on Law and the Economy, Federal Regulation: Roads to Reform (1979) at 92.

376. Smith, supra note 355, at 10; footnotes omitted.

377. Paths to Justice, supra note 24, at 1.

378. Smith, supra note 355, at 11.

of their existence and potential. Second is the development of procedures and processes -- sometimes relatively fully developed and other times more conceptual and ad hoc -- to tailor the general processes to the specific agencies and programs. Third is an outreach to make members of the private sector comfortable with the potential of the new procedures. This was clearly demonstrated for example when the Chicago regional office of the Merit Systems Protection Board engaged in a conscientious outreach effort to make its constituents aware of its program, and that office had by far the widest use.[379] Fourth is the systematic sharing and evaluation of the experience with the new forms so that they can be adjusted to meet legitimate needs and a fuller understanding of their appropriate use developed.

The administrative process itself was in large measure born as an alternative means of dispute resolution -- a way other than courts for making important societal decisions. It is singularly appropriate, therefore, that it should be responsive to various forms of dispute resolution that are gaining broad acceptance in the civil sector. These processes can help administrative agencies fulfill their original potential. We are on our way in recognizing their role. That alone is a major first step towards broader, more successful use.

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379. Adams, supra note 170, at 10-11, 65-67, 85, 92.

APPENDIX I
SURVEY OF DISPUTE RESOLUTION METHODS USED IN THE ADMINISTRATIVE PROCESS

This survey is a rough "catalogue" of the uses agencies currently make of alternative means of dispute resolution. It is based on three sources: (1) Agencies' responses to a questionnaire developed in conjunction with the Office of the Chairman of the Administrative Conference and circulated to the agency members of the Conference. (2) A review of all references in the United States Code to the terms "arbitration, mediation, conciliation, negotiation, or informal." (3) Programs that have come to our attention informally.

It excludes for the most part programs dealing solely with labor relations, which to a very real extent are the most rich in their use of ADR techniques. They are not included because they so closely resemble their private sector counterpart and are basically a special case.

Department of Commerce.

Office of Export Enforcement. Under the Export Administration Act of 1979 50 U.S.C. Appendix 2410 the Office of Export Enforcement (OEE) issues an initial contact letter informing a party of its intention to issue a charging letter. The party may discuss the proposed charges with the OEE and attempt to reach a pre-charging letter settlement. This method is used approximately 50% of the time and results in settlement of the dispute 95% of the time. This settlement is governed by regulations at 15 C.F.R. 388.17(b). If the dispute is not resolved, the charging letter is issued. The consent agreement which results from this process is reviewed by the Deputy Assistant for Export Enforcement.

Office of Anti-Boycott Compliance. This office uses the procedures followed by the Office of Export Enforcement in all of its disputes.

National Oceanic and Atmospheric Administration. The Office of the Secretary conducts a mediation of coastal zone management disputes under the Coastal Zone Management Act 16 U.S.C. 1451 et seq. Under the Act, the Secretary of Commerce is authorized to mediate disputes between a federal agency and a coastal state concerning a coastal management program. The Act also authorizes the Office of Ocean and Coastal Resources Management to mediate where a state agency intends to object to a federally licensed activity. The mediation must be agreed to by all parties. It is used once or twice a year. The mediation is governed by 15 C.F.R. part 930, subpart G. See also, 15 C.F.R. 930.124. If the mediation is not agreed to or fails, all parties have recourse to the courts. If informal mediation fails, formal appeal may be taken to the Secretary of Commerce.

The National Oceanic and Atmospheric Administration also administers the Deep Seabed Hard Mineral Resources Act, 30 U.S.C. 1401 et seq. with implementing regulations at 15 C.F.R. part 980. Under this Act, U.S. companies seeking licenses to mine manganese must resolve all disputes involving overlapping mine sites. The administrator of NOAA may resolve these conflicts applying principles of equity. Under 15 C.F.R. 970.302 the administrator will encourage companies to resolve the conflicts voluntarily. The NOAA will then review any subsequent voluntary agreement. This method of dispute resolution has been used one time.

Personnel Law Division. The Division conducts arbitration of employee grievances under the Civil Service Reform Act, 5 U.S.C. 7121. Arbitration has been used approximately eight times a year and is governed by regulations in 29 C.F.R. 1404 and Collective Bargaining Agreements.

Federal Emergency Management Agency

The agency uses alternative methods of dispute resolution in two instances. (1) FEMA uses arbitration under the Urban Property Protection and Reinsurance Act, 12 U.S.C. 1749(b). The procedures are set forth in 44 C.F.R. 56.37. No cases have been brought under this Act to date. (2) FEMA uses standard dispute resolution techniques in such matters as equal opportunity cases, adverse actions, performance ratings, and Merit Systems Protection Board cases.

Commodity Futures Trading Commission.

See Appendix II. The Commodity Exchange Act encourages private sector mechanisms for dispute resolution in requiring designated contract markets and registered futures associations to provide a voluntary equitable procedure through arbitration or otherwise, for the settlement of customers' claims and grievances against any member or employee. See 7 U.S.C. 7A(11),21(b10). There is currently no limitation on the monetary value of claims which may be subject to arbitration. The Commission recently amended its rules under 17 C.F.R. 170.8, 180.2 to encourage the use of arbitration as a means of dispute resolution. See 48 Fed. Reg. 22136.

Consumer Product Safety Commission.

Under the Federal Hazardous Substances Act, 15 U.S.C. 1266, the Commission must provide any person alleged to have violated the Act appropriate notice and opportunity to present his views either orally or in writing prior to the Commission's referring a case to the U.S. Attorney for criminal prosecution. The Commission is also required to use informal dispute resolution procedures under 5 C.F.R. 752.404 in the settlement of any employee disputes.

Department of Agriculture.

Packers and Stockyard Division. Private parties may file complaints under the Packers and Stockyards Act. See 7 U.S.C. 181 et seq. This complaint is filed in the field offices of the Packers and Stockyards Administration. The office will investigate the complaint and the regional supervisor may then express his opinions to the parties orally or by letter as to whether respondent may be liable to pay the complainant. After this process, if the parties wish to litigate, the case is referred to the Office of General Counsel for a reparation proceeding. Records of the numbers of such mediations which have not been followed by reparation cases have not been kept in recent years. In fiscal year 1974, the number of mediation cases was approximately 600 which far exceeded the number of formal reparations proceedings.

Natural Resources Division. The agency conducts agency-initiated methods of dispute resolution under the National Forest System. The procedures for dispute resolution include appeals of decisions of forest officers under 36 C.F.R. 211.18. This is a broad informal appeals process which is applied in approximately 300 cases annually. Other rules of procedure include 36 C.F.R. 228.14 which is an appeals process available to mineral operators aggrieved by decisions in connection with the regulations governing locatable minerals and 36 C.F.R. 292.15 which is an appeals process for owners of private land within the Sawtooth National Recreation Area. A line officer of the Forest Service resolves disputes in each of these specified procedures.

Department of Defense.

The vast majority of dispute resolution mechanisms within the Department of Defense are not conducted pursuant to the APA. The following are the responses of the component agencies within the Department of Defense which use alternative forms of dispute resolution.

Army Corps of Engineers. The Corps of Engineers uses an intervening management level review to attempt to resolve contract disputes that would otherwise have to be resolved by resort to trial-type hearings before the Engineers Board of Contract Appeals. This informal review is called Division Review of Final Contracting Officer Decisions Made at the District Level. This review involves a document review and an informal hearing held by the division engineer or his deputy at which both the contracting officer and the contractor appear and present their views and arguments. The division review informal hearing process is used at the option of the division engineer. The process is used in about 1/4 to 1/2 of all contract dispute cases. There are no formal rules of practice or procedure for this review process. The hearing is informal and within the sole discretion of the division engineer who presides at these informal hearings. If the dispute is not resolved the Engineers Board of Contract Appeals holds a more formal hearing and subsequently renders its decision.

Armed Services Board of Contract Appeals. All the appeals to the ASBCA may potentially result in hearings, however, ASBCA Rule 11 allows the parties to submit their case on a documentary record without a hearing. Additionally ASbcA Rule 12 provides for a faster decisionmaking process on truncated proceedings where the amount in controversy is $50,000 or less.

Office of Dependent Schools. The Department's regulations governing the education of handicapped students in a DOD dependent school make mediation a prerequisite to a due process hearing to resolve a dispute between the parents of a handicapped student and school authorities. 32 C.F.R., Section 57, Appendix II, para. C2. School administrators who are usually not from the handicapped student's own school serve as mediators. If the mediation is unsuccessful, the parents or the school may petition for a due process hearing.

Department of Education.

Division of Research & Improvement, Vocational Education and Rehabilitation. The Randolph-Shepard Act, 20 U.S.C. 107 et seq. provides for the use of arbitration in the resolution of disputes concerning blind persons' priority in the operation of vending facilities on federal property. Blind vendors who are still dissatisfied with state action arising from the operation or administration of the program after being provided a full evidentiary hearing by the state may request the Secretary of Education to convene an arbitration panel to resolve the dispute.

The three member arbitration panel issues binding decisions that are considered final agency action. The Rehabilitation Services Administration has developed procedures for convening panels and conducting arbitration. The procedures are contained in a policy issuance program instruction, 1SA PI 7817. They provide for a formalized evidentiary hearing including oral argument, examination, and cross-examination, as well as submission of written briefs. Disputes are handled through this arbitration mechanism whenever requests to convene panels are received. The RSA reviews panel decisions for consistency with federal law and regulations.

Department of Energy.

The Department of Energy's adjudications are non-APA adjudications. In one instance, however, DOE uses an alternative method of dispute resolution.

Economic Regulatory Administration. The administration generally employs informal administrative procedures in authorizing applications to import or export natural gas. These procedures include the use of public conferences, pre-hearing conferences, oral and written presentations, and opportunities for reply comments. The Economic Regulatory Administration almost always uses informal mechanisms in its consideration of natural gas import and export authorizations. Procedures are governed by 18 C.F.R., Chapter 1, but new rules have been proposed. The agency decides which procedures will be applied. The ERA administrator acts as the decisionmaker in the process. The ERA also, in certain instances, has required opposing parties to meet privately to resolve certain problems or to obtain additional factual information. Under this private sector mechanism, the ERA establishes the time-table under which parties will meet. This private sector mechanism has not been used frequently.

Federal Energy Regulatory Commission. Approximately 80% of the Commission's caseload is resolved through negotiated settlements without appointment of an ALJ. However, a settlement judge may be appointed when informal discussions have not been fruitful but one or more parties believes it is possible to settle the case. Settlement judges were appointed in seven cases in fiscal year '83. The settlement judge is appointed pursuant to 18 C.F.R. 385.603.

In addition, the Commission staff engages in a form of mediation in developing environmental conditions on licenses for hydroelectric generating plants. It also uses a form of mediation among interested parties in developing environmental impact statements and developing nationwide plans.

Nuclear Waste. The DOE is required to resolve disputes concerning the siting of nuclear waste repositories through a written agreement with the affected state or Indian tribe, arrived at through negotiation or arbitration. See 42 U.S.C. Section 10131 et seq.

Department of Health and Human Services.

Within the Department of Health and Human Services, the Public Health Service, the Health Care Financing Administration, the Office of Human Development Services, and the Office of Community Services provide for a variety of non-APA adjudications. Informal dispute resolution, where it exists, has no predetermined procedures or personnel.

The Health Care Financing Administration, however, is required under 45 C.F.R., Section 201.6(c) to pursue informal efforts to resolve disputes with a state, before instituting a formal hearing. In addition, all the agencies with which the Health Care Financing Administration deals attempt to informally resolve disputes with grantees prior to the commencement of formal proceedings.

HHS is also required to publish regulations to provide for appropriate investigative, conciliation and conference procedures for the resolution of age discrimination suits in federally assisted programs. See 42 U.S.C. Section 6101.

The Departmental Grant Appeals Board of HHS has established a mediation program. The process was modeled on one established by EPA which created a program in 1979. HHS's rule provides that the Board in consultation with the parties may suggest the use of mediation techniques and will provide or assist in selecting the mediator. The mediator may take any steps agreed upon by the parties to resolve a dispute or clarify the issues. The results of mediation are not binding upon the parties unless they so agree in writing. The Board will also provide people trained in mediation skills to aid in resolving a dispute that is not pending before the Board itself. At least seven cases have been heard under this process.

Department of Housing and Urban Development.

Bid protests under National Housing Act Contracts, 12 U.S.C. Section 1701 et seq, 42 U.S.C. 3535(d) and 24 C.F.R. Part 20 Subpart C, may be decided by the HUD Board of Contract Appeals upon written submission of the protestor and procuring agent. This procedure is followed in all cases of bid protests under a National Housing Act Contract. The procedure is used in approximately 8 cases per year.

The Fair Housing Act of 1968, 42 U.S.C. Section 3601 et seq directs the secretary to attempt to resolve all complaints under the Act through informal methods of conference, conciliation or persuasion.

Department of Transportation.

Urban Mass Transportation Administration. The Department's Disadvantaged Business Enterprise Regulations require an UMTA recipient who is unable to meet a 10% goal to meet with a UMTA administrator to discuss how best to meet that goal. The UMTA currently is considering the possibility of encouraging private parties with complaints against UMTA recipients to try to resolve those disputes locally before involving UMTA.

Office of Civil Rights. The Office uses alternative methods of dispute resolution in considering participation by minority business enterprises in Department of Transportation programs. Any firm which believes that it has been wrongly denied certification as a minority business enterprise may file an appeal with the Department of Transportation. This appeal is governed by regulations in 49 C.F.R. 23.55. The Secretary of Transportation serves as fact finder over these cases with delegation to the Departmental Director of Civil Rights. Approximately 180 cases are handled per year in this program.

The DOT also encourages recipients of financial assistance to establish procedures for hearing appeals of denials of minority business enterprise certification. These recipients are usually local or state governments. This non-federal mechanism is not widely used. Perhaps less than 10 recipients have established their own procedures for hearing these appeals. The recipients who have established such a procedure address a rather high number of cases -- possibly 150 to 200 per year. The Department of Transportation does not monitor the operation of these hearings. Businesses denied certification maintain the right to file an appeal with the Department when they are dissatisfied with the results of recipient's hearings.

National Highway Traffic Safety Administration. Where the agency believes civil penalties may be appropriate for violations of the Motor Vehicle Information and Cost Saving Act, 15 U.S.C. 1981-1991, or the Federal Motor Vehicle Safety Standards promulgated under the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. 1392, NHTSA has developed procedures for informal resolution without resort to an agency hearing. The procedures are not incorporated by the agency in its regulations. Generally the agency sends the manufacturer a notice letter advising it of the agency's view that a violation exists and of the possible liability for civil penalties. This letter informs the manufacturer that it has the opportunity to submit data to use in arguments that would show that the violation did not occur and/or that there is a reason to mitigate the amount of the penalty. The agency then considers the information submitted by the manufacturer and arrives at what it views as an appropriate civil penalty amount. Further negotiations may proceed before the final figure is established. From August 1982 to August 1983 the above procedures have resulted in the collection of $146,000 in penalties for 11 standards enforcement cases and a total of $9,000 for nine odometer cases.

Environmental Protection Agency.

In the area of hazardous wastes, Section 3013 of RCRA authorizes EPA to issue orders requiring parties to conduct testing or monitoring of hazardous waste sites or facilities. Section 106 of the Superfund authorizes EPA to issue orders requiring parties to take action necessary to protect the public from the dangers associated with the release of hazardous substances. Recipients of either type of order may take advantage of the opportunity to informally confer with the agency concerning the terms of the order. There are no set procedures governing the conduct of the proceedings. In 1983 there were 15 Section 3013 orders and 26 Section 106 orders issued. The selection of presiding officers for this proceeding has not been standardized.

Under the Superfund Act any claim against the fund rejected by the President is to be heard by a member of a Board of Arbitrators. 42 U.S.C. Section 9612. An arbitrator's decision may be appealed to a Federal District Court but may only be reversed if found to be arbitrary and capricious.

Arbitration is also authorized by the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. Section 136 which requires the use of arbitration to establish the compensation due for one applicant's use of prior submitted data in an application for registration of a pesticide. 7 U.S.C. Section 136(a).

Equal Employment Opportunity Commission.

Under 42 U.S.C. Section 2000-e-5(b) the EEOC is authorized to attempt to eliminate alleged unlawful employment practices by informal methods of conference, conciliation and persuasion.

Federal Communications Commission.

The FCC uses several agency initiated alternatives to dispute resolution.

Paper hearings. Under 47 U.S.C. Section 309e, the FCC may conduct paper hearings in situations where there are competing applicants for low power television service. To date, none have been conducted. The rules of practice governing these hearings are found at 47 C.F.R. Section 1.241a. If the Commission cannot resolve the controversy, a regular trial-type hearing is conducted.

Expedited hearings. Under 47 U.S.C. Section 309e the Commission may conduct expedited hearings involving basic qualifying issues for competing applicants for cellular radio service facilities. The FCC reports that this procedure basically involves strict adherence to a hearing schedule already prescribed by the rules. The rules governing this expedited hearing are found in 47 C.F.R. Section 22.916 and Section 22.917.

The FCC also provides for private sector mechanisms for some licensees who are encouraged to resolve electrical interference problems without the Commission's intervention. Absent industry cooperative efforts the resolution of these interference issues would trigger agency proceedings. The agency does not keep detailed information about the exact measures taken by communications industries in private sector negotiations. The agency also does not review measures negotiated and placed into effect through private action. The agency's Field Operations Bureau does monitor and reinforce the effectiveness of these measures.

Federal Election Commission.

Under 2 U.S.C. 437(g), if upon investigation of a complaint or upon its own initiative the FEC concludes a violation of federal campaign laws has occurred, the FEC has 30 days to make every effort to conciliate a resolution of the violation. Any resulting conciliation agreement will conclude the FEC's interest in the matter. If informal dispute resolution methods fail, the FEC may file a civil action.

Federal Labor Relations Authority.

Title VII of the Civil Service Reform Act of 1978 established the Federal Service Impasses Panel as an entity within the FLRA. This panel is to provide assistance in resolving negotiation impasses between federal agencies and exclusive representatives of federal employees. The Impasses Panel is not required to use any particular procedure in the resolution of negotiation impasses. The Panel has broad authority to fashion procedures appropriate to resolve disputes and does so on a case-by-case basis. The following are the most often used procedures.

Factfinding. Factfinding involves a hearing before a Panel member or a Panel designee the purpose of which is to establish a complete record of the issues in dispute and the positions of the parties. This involves a trial-type hearing after which the Panel issues its own settlement recommendations or it may issue a binding decision.

Written submissions. This procedure does not involve a hearing. The parties exchange written statements of position and supporting evidence and may subsequently exchange rebuttal statements. After consideration of the written material the Panel may make recommendations for settlement or issue a binding decision.

Arbitration. The Civil Service Reform Act of 1978 authorizes the parties to voluntarily submit their dispute to an independent arbitrator after the procedure has been approved by the Panel.

Med-Arb. When med-arb is used a neutral is given the authority to both mediate the dispute and make a binding award on those issues not resolved during the mediation. This procedure often leads to a resolution without the neutral having to issue a decision.

The Federal Service Impasses Panel makes the decision as to which procedures will be used to resolve a dispute. To date, factfinding has been directed 14 times, written submissions have been employed 42 times, outside arbitration has been recommended in 14 cases and the med-arb procedure has been used in 20 cases. The Impasse Panel's regulations governing factfinding hearings can be found in 5 C.F.R. Parts 2470 through 2472. There are no published rules or procedures applicable to the other procedures. Factfinding hearings are held by a panel member or a panel designee. There is no designated representative when written submissions are used. Outside arbitration is conducted by a panel designee or a person chosen by the parties. Each of these procedures will result in a final and binding decision unless the parties have negotiated a settlement.

Federal Maritime Commission.

The Commission uses several alternative methods for resolving disputes without resorting to formal hearings.

The Commission uses an informal procedure for adjudication of small claims -- those claims for less than $10,000. The proceeding is conducted under the APA by a settlement officer and by the Secretary of the Commission. The record consists of written evidence and arguments. The decision of the settlement officer is not subject to appeal by the parties but may be reviewed by the Commission on its own motion. The parties, however, may seek review in federal court. The regulations governing this informal procedure are found at 46 C.F.R., Section 502.301.

The Commission uses a shortened adjudicatory procedure conducted before an ALJ. The proceeding is limited to the submission of memoranda, facts and arguments. The parties must consent to this procedure which is used frequently.

The Commission has also used a non-adjudicatory fact finding investigation. These investigations are conducted by agency personnel designated by the Commission. The regulations for this investigation procedure are found at 46 C.F.R., Section 502.281.

The Commission also has a conciliation service. The regulations are found at 46 C.F.R., Section 502.401. This conciliation service is rarely used. This dispute resolution mechanism is applied when all parties consent to the conciliation service. The parties must also consent to any opinion developed as a result of the conciliation service.

The Commission also develops compromise agreements in its application of civil penalties. The Commission's Bureau of Hearing Counsel is authorized to assess penalties, enter into negotiations and reach a compromise with the person involved and to obtain payment of the penalty. Any compromise agreement is executed between a party and the Director of the Bureau of Hearing Counsel. The regulations covering this procedure are found at 46 C.F.R., Section 505.4. If agreement cannot be reached on the terms of a civil penalty, the matter is referred to the Commission for a formal proceeding.

The Commission also oversees two private sector mechanisms for dispute resolution. First, the Commission oversees a self-policing mechanism used by shipping conferences or other rate-making associations under Section 15 of the Shipping Act of 1916 found at 46 U.S.C. Section 14. Under this mechanism a neutral body investigates alleged violations of agreements by members of the conferences or rate-making associations and determines if fines are merited. All conferences or rate-making associations of more than two members are required to employ such self-policing mechanisms and to report to the Commission periodically on their activities. The Commission does not generally review decisions of the neutral bodies.

Second, shippers may also file complaints with conferences and other rate-making bodies concerning the rates and practices of the conferences. The procedure is required by Section 15 of the Shipping Act, 46 U.S.C. Section 814 and by 46 C.F.R. Part 527. If the conference does not respond favorably to a request, the complaining party may file a formal complaint with the Commission.

Federal Mediation and Conciliation Service.

The function of the Federal Mediation and Conciliation Service is to assist parties to labor disputes through conciliation and mediation. The Service is utilized in disputes which significantly affect Commerce. FMCS mediates complaints brought under the Age Discrimination Act.

Federal Reserve System.

The Federal Reserve System processes consumer complaints against state member banks and forwards any complaints it receives against other creditors or businesses to the appropriate state or federal enforcement agencies. In 1982 the System received 2,840 complaints of which 1,226 were against state member banks. The Federal Reserve banks respond to these complaints in writing. The Federal Reserve Board monitors the complaint resolution process by periodically reviewing complaint investigations and responses and complaint handling activities of the Federal Reserve Banks.

Federal Trade Commission.

See Appendix III.

General Accounting Office.

The GAO provides an alternative to trial-type dispute resolution in its Bid Protest Forum which is described in 4 C.F.R. Part 21. This Forum handles approximately 1,000 cases each year. An attorney with GAO writes the initial draft decision. All final decisions are signed by the Comptroller General.

The GAO uses alternatives to trial-type hearings in settling doubtful claims and in considering advance decisions. See 31 U.S.C. Section 711, 31 U.S.C 3529 and 31 U.S.C. 3702. The agency chooses when to use alternative procedures. Such procedures were used in fiscal year 1982 in rendering approximately 1,000 advance decisions and in determinations of accountable officers' liabilities. In the claims area the GAO handled 1,000 waiver requests, 7,241 claims by the U.S. and 2,400 claims against the U.S. The procedures are set forth in 4 C.F.R. Ch. I, parts 22, 30-35, 53, 91-93, Ch. II, parts 101-105. Claims are handled by claims examiners, with appeals taken to attorneys in the Office of General Counsel. Individuals dissatisfied with GAO actions may appeal to the courts.

Interstate Commerce Commission.

Most of this Commission's cases are decided through its modified procedure whereby the agency decides a case exclusively on written submissions under the APA. The Commission's Office of Proceedings prepares all modified procedure decisions.

Merit Systems Protection Board.

See Appendix II.

National Mediation Board.

The Railway Labor Act, 41 U.S.C. Section 151 et seq. created the Board to settle railroad/employee disputes. If mediation fails, the Board is to induce the parties to enter arbitration. Arbitrators are selected under procedures found in 45 U.S.C. Section 157.

Nuclear Regulatory Commission.

The NRC has experimented with the use of informal procedures in its licensing proceedings. On several occasions the Chairman of the Atomic Safety and Licensing Board Panel has selected a member of the Panel to act as a presiding officer. This presiding officer may allow parties to present oral arguments at his discretion. An order may be issued by the Commission based upon written comments received by the presiding officer. Regulations have not yet been developed to govern this type of informal dispute resolution. The Commission's authority to conduct these informal proceedings is found in 42 U.S.C. 2239.

Office of the Federal Inspector, Alaska Natural Gas Transportation System.

This agency oversees the construction of the Alaska Natural Gas Transportation System. The agency employs informal dispute resolution mechanisms in its determination of rate-based decisions and in its investigation of claims of racial discrimination. The procedures are set forth in 46 Fed. Reg. 51726 and Enforcement Procedures for Equal Opportunity Regulations, 10 C.F.R. Part 1534. The agency attempts to resolve disputes through conciliation, however, if matters are not resolved the Federal Inspector has the final decision.

Pension Benefits Guaranty Corporation.

The PBGC has an appeals board which has the discretion to grant an oral hearing, however no such hearing has ever been held. The board handles approximately 250 cases per year. The board's procedures are found at 29 C.F.R. 2606.52 et. seq.

The PBGC has two alternatives to the appeals board, reconsideration and informal review. An aggrieved party may request reconsideration of a PBGC staff decision. This reconsideration will be undertaken by a person of higher authority than the original decisionmaker. The procedures for reconsideration are found at 29 C.F.R. 2606.31 et seq. The decision to request appeal or reconsideration depends upon the type of determination made. The PBGC makes over 900 reconsiderations per year. A person dissatisfied with the result of a reconsideration may sue in court.

The second informal procedure used by the PBGC is an informal review process under 29 C.F.R. Section 2606.1(c).

See discussion in Appendix II.

Postal Rate Commission.

The Postal Rate Commission currently follows a complaint case procedure set forth in 39 C.F.R. Section 3001.85. The Commission, however, has a proposed rulemaking [check status] which would amend its current procedure to include a provision that would allow the Commission to use informal inquiry methods to resolve complaint cases. Under this proposal, the Commission may choose to conduct a preliminary investigation before filing a formal answer in a complaint case. Under this proposal, a Commission employee would act as a facilitator of a pending dispute. If the informal inquiry method did not resolve the dispute, a formal complaint case would proceed.

Railroad Retirement Board.

The board's adjudications are non-APA adjudications. The agency, however, has proposed using a board of real estate appraisers in resolving disputes concerning a value of a home under the Railroad Retirement Act. See 45 U.S.C. Section 395.8(d). The board has also considered using a similar mechanism to resolve benefit disputes under the Rock Island Railroad Transition and Employee Assistance Act, 45 U.S.C. Section 1001 et seq.

Securities and Exchange Commission.

The SEC does not employ any alternative methods of dispute resolution. However, the Commission does in 17 C.F.R. 202.5C provide for a procedure by which the subject of a Commission investigation may submit a written statement to the Division of Enforcement explaining why no enforcement action should be brought against him.

Additionally, the SEC has encouraged the security industry's self-regulatory organizations to adopt a uniform code of arbitration. This arbitration is available for resolution of certain disputes between broker/dealers and their customers. The Commission also relies on the self-regulatory organizations to discipline their members for violations of security laws and the regulatory organization's own rules. This practice is authorized by Sections 6(b)6, 15a(b)(7) and 19(g)(2) of the Exchange Act of 1934.

APPENDIX II
CASE STUDIES OF ADMINISTRATIVE ARBITRATION

Federal Insecticide, Fungicide and Rodenticide Act.

The Federal Insecticide, Fungicide and Rodenticide Act[380] authorizes the Environmental Protection Agency to use data received from one applicant for a pesticide registration in support of another applicant's request for registration. The Act requires the applicant which benefits from the use of another's data to compensate the original data submitter for its use.[381] FIFRA's 1978 amendments[382] mandate the use of arbitration to resolve disputes between pesticide manufacturers concerning the amount of compensation owed.

EPA's use of previously submitted data in support of subsequent "me-too" or "follow-on" pesticide registration applications was first authorized by statute in 1972[383] in the Federal Environmental Pesticide Control Act,[384] which amended FIFRA to convert it from a licensing and labelling statute into a comprehensive regulatory scheme governing the use, sale and labelling of pesticides.[385] These 1972 amendments created the data use provision which requires an applicant to compensate an original data submitter for the benefit derived from the use of its data.[386] Originally, EPA was to determine the proper amount of compensation due in cases in which the parties could not negotiate a price.[387] However, Congress amended FIFRA in 1978, restructured the data compensation system and

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380. Pub. L. No. 80-104; 61 Stat. 163 (1947), codified as amended 7 U.S.C. § 136 et seq.

381. § 3(c)(1)(D); codified at 7 U.S.C. § 136a(c)(1)(D).

382. Federal Pesticides Act, Pub. L. No. 95-396; 92 Stat. 819 (1978).

383. Federal Environmental Pesticide Control Act, Pub. L. No. 92-516; 86 Stat.977 (1972).

384. See Ruckelshaus v. Monsanto, 104 S.Ct. 2862 (1984).

385. As enacted in 1947, FIFRA was primarily a licensing and labelling statute. Under the Act, each pesticide had to be registered with the Secretary of Agriculture prior to sale. The Act required a manufacturer seeking a pesticide registration to supply the Secretary with information necessary to support the claims made on the label. The Act prohibited the Secretary from disclosing a manufacturer's formula but was silent concerning the Secretary's obligation in regard to health and safety data submitted with an application. The 1972 amendments expanded FIFRA to regulate the use, sale and labelling of pesticides. Congress added an environmental criterion to the requirements for a pesticide registration. Since 1972 the administrator of the Environmental Protection Agency must find that a pesticide will not cause unreasonable adverse affects on the environment before registering a new pesticide.

386. § 3(c)(1)(D); 86 Stat.

387. Id.

prescribed the use of binding arbitration to resolve disputes concerning the amount of compensation one applicant should pay to another for the use of its data.[388]

Congress's reason for establishing binding arbitration for resolution of these disputes is not entirely clear.[389] Although the data compensation provisions were the subject of much debate, the central issues involved what data would be compensable and the duration of any compensation period accorded to original data submissions.[390] The legislative history does not explicitly reveal why Congress instituted binding arbitration. Congress was concerned that the resolution of the controversies that had developed over the existing compensation scheme was consuming too many agency resources. It, and EPA, felt that these decisions did "not require active government involvement, [but rather should] be determined to the fullest extent practicable, within the private sector."[391] The notion of using binding arbitration emerged as a compromise between the data suppliers and the data users.[392]

It operates only if the parties have failed to agree on an amount of compensation or to a procedure for reaching agreement. Thus, the legislation primarily encourages the parties to resolve a dispute over compensation through private agreement and authorizes binding arbitration only as a last resort.[393]

FIFRA grants original data submitters a right to compensation when data is used for the benefit of another applicant within fifteen years of the original data submission.[394] Under the Act, any applicant who will benefit from EPA's use of

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388. 7 U.S.C. § 136a(c)(1)(D).

389. U.S. Congress, House Joint Committee on Conference, to accompany S.1678, a bill to amend the Federal Insecticide Fungicide and Rodenticide Act, 95th Congress 2nd Session, H. Report 95-1560, September, 1978; U.S. Congress, House, Committee on Agriculture, Report to accompany H.R. 7073 a bill to extend the Federal Insecticide Fungicide and Rodenticide Act, 95th Congress, 1st Session, H. Report No. 95-343; U.S. Congress, House, Committee on Agriculture, Report to accompany H.R. 8681. 95th Congress 1st Session, H. Report No. 95-663.

390. U.S. Congress, House, Committee on Agriculture, Report to accompany H.R. 7073, 95th Congress 1st Session, H. Report No. 95-343, p. 3.

391. Statement of Sen. Leahy, floor manager of S. 1678, 123 Cong. Rec. 25709 (1977). See the description of Congress's concern in Thomas v. Union Carbide Agr. Products Co., 105 S. Ct. 3325, 3329-3330 (1985).

392. Hearings on Extending and Amending FIFRA before the Subcommittee on Department Investigations, Oversight, and Research of the House Committee on Agriculture, 95th Cong., 1st Sess., 522-523 (1977) (testimony of Robert Alikonis, General Counsel to Pesticide Formulators Assn.).

393. 7 U.S.C. § 136a(c)(1)(D)(ii).

394. § 3(c)(1)(D) divides the data EPA may use into three categories, data supplied to EPA before 1969, data supplied after 1969, and data supplied after 1978. The Act permits EPA to use data supplied prior to 1969 in its (continued...)

data submitted less than fifteen years earlier by another applicant must make an offer to compensate the original data submitter for this use. If after ninety days the new applicant and the original data submitter have not reached agreement on the amount and terms of compensation either party may submit the dispute to arbitration by filing a request with the Federal Mediation and Conciliation Service.[395] Participation of both parties is compelled since an original data submitter who fails to participate forfeits its right to compensation and any new applicant who fails to participate will be denied registration.[396]

For the purpose of complying with FIFRA, the Federal Mediation and Conciliation Service has adopted the roster of commercial arbitrators of the American Arbitration Association as well as AAA's FIFRA arbitration rules.[397] Requests for arbitration are forwarded directly to the AAA which notifies the other party of the request.[398] Unless the parties agree to a different procedure, AAA selects an arbitrator from the AAA roster after each party has reviewed a list of potential arbitrators and rated these individuals by degree of acceptability.[399] Unless the parties specify otherwise, a single arbitrator hears each dispute.[400] Neutrality is the central qualification for serving as an arbitrator.[401] Each person appointed as a neutral arbitrator must disclose to AAA any circumstances which could affect his impartiality including any financial interest, bias or past relationship with any of the parties.[402] AAA determines whether an arbitrator is or is not neutral.[403]

394.(...continued)
consideration of any application for registration without the permission of the original data submitter. This data submitter is not entitled to any compensation for the use of its data. EPA may use data supplied to it after 1969 in its consideration of any other manufacturer's application so long as the benefitting applicant makes an offer to compensate the data submitter for the use of its data. The third category of data is that which is supplied to EPA after September 30, 1978. FIFRA guarantees that the applicant who submits data after September 30, 1978 will have exclusive use of this data for a period of ten years. At the end of this ten year period this data submitter will be entitled to compensation for the use of its data for a period of five years. See, § 3(c)(1)(D)(iii).

FIFRA also provides for the use of binding arbitration to resolve the question of compensation when pesticide registrants agree to share the cost of supplying EPA with any additional data requested and are unable to agree on the amounts of contribution. 7 U.S.C. § 136a(2)(B)(iii).

395. 7 U.S.C. § 136a(c)(1)(D).

396. Id.

397. 29 C.F.R. § 1440.1(b).

398. 29 C.F.R. § 1440.1(a).

399. 29 C.F.R. § 1440.1 Appendix Sec. 6.

400. 29 C.F.R. § 1440.1 Appendix Sec. 9.

401. 29 C.F.R. § 1440.1 Appendix Sec. 5.

402. 29 C.F.R. § 1440.1 Appendix Sec. 11.

AAA's determination is appealable to FMCS whose decision is conclusive.[404]

Once the arbitrator is selected, the claimant or person seeking compensation has 60 days in which to file a statement detailing the amount claimed and the reasons to support the claim.[405] The other party then has 60 days to respond.[406] The parties may move for discovery through written interrogatories or requests for production of documents.[407] The arbitrator grants requests designed to produce relevant evidence and allows discovery to a degree, "consistent with the objective of securing a just and inexpensive determination of the dispute without unnecessary delay."[408] The arbitrator is empowered to order depositions upon a showing of good cause.[409] The arbitrator may arrange a prehearing conference in which the parties appear before him to consider the possibility of settling the dispute, narrowing the issues, obtaining stipulations or otherwise expediting the disposition of the proceeding.[410] At the hearing, the claimant presents his case followed by the respondent.[411] The claimant must carry the burden of coming forward with evidence to support his claim.[412] The arbitrator decides each issue based upon a preponderance of the evidence.[413] Any party may request that a stenographic record of the hearing be kept and designated the official transcript of the proceeding.[414] After the hearing, the parties may submit written briefs supporting their position and the arbitrator may at his discretion permit oral argument on these briefs.[415]

The arbitrator must issue a decision after the proceeding has closed.[416] This decision must contain findings of fact and conclusions of law with reasoning covering all issues in dispute in the case. The decision must also contain a determination concerning any compensation due.

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403. Id.

404. Id.

405. 29 C.F.R. § 1440.1 Appendix Sec. 13(a).

406. 29 C.F.R. § 1440.1 Appendix Sec. 13(b).

407. 29 C.F.R. § 1440.1 Appendix Sec. 23.

408. 29 C.F.R. § 1440.1 Appendix Sec. 23(a).

409. 29 C.F.R. § 1440.1 Appendix Sec. 23(b).

410. 29 C.F.R. § 1440.1 Appendix Sec. 24.

411. 29 C.F.R. § 1440.1 Appendix Sec. 26.

412. 29 C.F.R. § 1440.1 Appendix Sec. 28.

413. Id.

414. 29 C.F.R. § 1440.1 Appendix Sec. 29.

415. 29 C.F.R. § 1440.1 Appendix Sec 30.

416. 29 C.F.R. § 1440.1 Appendix Sec. 32.

Parties involved in cases in which the disputed amount is $25,000 or less may opt for resolution of their dispute through an expedited procedure.[417] Under this procedure the claim proceeds to hearing within thirty days without discovery or the submission of briefs. The arbitrator's decision consists of short summary findings of fact and conclusions of law.

FIFRA provides that an arbitrator's decision is final and conclusive.[418] The decision is reviewable in court only in the case of "fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrator. . . ."[419] This narrow scope of judicial review is typical of the level of judicial review available in commercial arbitration.

The arbitration provision has sparked a host of constitutional challenges that are reviewed above.[420]

Pension Benefit Guaranty Corporation.

The Multiemployer Pension Plan Amendments Act of 1980[421](MPPAA) amended the Employee Retirement Income Security Act of 1974[422] (ERISA), to impose liability upon any employer that withdraws from a multiemployer pension plan.[423] MPPAA requires pension plan sponsors and withdrawing employers to arbitrate disputes over the amount of an employer's withdrawal liability.[424]

As originally enacted, ERISA permitted employers to withdraw from multiemployer plans free of any future liability so long as the plan did not terminate within five years of that employer's withdrawal.[425] The employer's obligation to the plan ceased upon withdrawal. However, the plan itself remained liable to pay the benefits which had been promised to that employer's employees during the period of participation. MPPAA created withdrawal liability to prevent employers from withdrawing and leaving the plan obligated to pay the benefits from a reduced pension fund pool.[426] Upon an employer's withdrawal from a plan, MPPAA requires the plan sponsor to determine the extent of the withdrawal liability.[427] Any dispute that arises concerning any determination made by the plan sponsor is resolved through arbitration.[428]

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[417] 29 C.F.R. § 1440.1 Appendix Sec. 22.

[418] 7 U.S.C. § 136a(c)(1)(D)(ii).

[419] Id.

[420] See discussion in text at notes 114-119; 154-165.

[421] P.L. No. 96-364, 94 Stat. 1217, codified at 29 U.S.C. § 1381 et.seq.

[422] P.L. No. 93-406, codified at 29 U.S.C. § 1001 et. seq.

[423] A multiemployer pension plan is one which is maintained under one or more collective bargaining agreements and covers employees of two or more employers. Employers contribute to the plan fund at rates specified in their agreements. These contributions are paid into a pooled fund which is administered by a board of trustees composed of employer designated and union designated members.

[424] 29 U.S.C. § 1401.

[425] 29 U.S.C. § 1001.

MPPAA's legislative history does not reveal why Congress instituted compulsory arbitration to determine a withdrawing employer's liability to the plan sponsor.[429] The bill which originally passed the House[430] did not contain an arbitration provision. The Senate passed a bill[431] in the form of a substitute to the House bill. This Senate bill contained an arbitration provision. There is no Senate Report. The House amended the provision to affect the level of judicial review, and this was accepted by the Senate. The Conference Report is silent concerning the arbitration provision.[432]

The Act directs the Pension Benefit Guaranty Corporation to promulgate rules governing the conduct of the prescribed arbitration.[433] The PBGC published a proposed rule on July 7, 1983.[434] PBGC received 20 comments and incorporated many of the suggestions in the final rule which was published on August 27, 1985. PBGC resolved conflicting suggestions by determining which views best fulfilled the statutory mandate to establish "fair and equitable procedures."[435] Prior to the rules' becoming effective, employers and plan sponsors arbitrated their disputes under Multiemployer Pension Plan Arbitration Rules jointly sponsored by the International Foundation of Employee Benefit Plans and the American Arbitration Association.[436] The new rules apply to arbitration proceedings initiated, pursuant to Section 42221 of the Act, on or after September 26, 1985.[437]

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426. U.S. Congress, Committee on Conference, 96th Congress H. Rept. 96-1343.

427. 29 U.S.C. § 1381-1399.

428. 29 U.S.C. § 1401.

429. U.S. Congress, Committee on Conference, 96 Congress H. Rept. 96-1343; House, Committee on Education and Labor, H. Rept. 96-889.

430. H.R. 3904, May, 1980.

431. S. 1076 July, 29, 1980.

432. H. Rept. 96-1343.

433. 29 U.S.C. § 1401(a)(2).

434. 48 Fed. Reg. 31241 (July 7, 1983).

435. 50 Fed. Reg. 34679 (August 27, 1985).

436. The Multiemployer Pension Plan Rules are sponsored by the International Foundation of Employee Benefit Plans and administered by the American Arbitration Association. The rules became effective on June 1, 1981, and are available from the AAA.

437. 50 Fed. Reg. 34683 (August 27, 1985).

In lieu of the PBGC's final rules governing arbitration, disputing parties may also use other plan rules procedures if they are consistent with the PBGC rules[438] or if they are approved by the PBGC in accordance with procedures set forth in § 2641.13.[439] The PBGC will approve the alternative procedures if the proposed rules will be substantially fair to all parties involved and if the sponsoring organization is neutral.[440]

Under the Act and the PBGC final rules,[441] either of the parties may initiate arbitration within the 60 day period beginning on the 121st day after the date on which the employer requested reconsideration, or if the plan sponsor responds earlier to the request, within 60 days after the employer receives the notification of reconsideration. The parties may jointly request arbitration for 180 days after the plan sponsor has notified the employer of the contractual liability and demanded payment.[442]

The arbitrator's powers and duties are, with a few exceptions, the same as an arbitrator conducting a proceeding under Title 9 of the U.S. Code.[443] The rules require the arbitrator to follow existing law, as discerned from pertinent authority.[444] The regulation does not, however, tell the arbitrator exactly where settled law is to be found.[445]

The final rules differ from the proposed rules in that they do not paraphrase the statutory presumptions that the arbitrator must make as set forth in Section 4221(a)(3) of the Act. The PBGC agreed with several comments that it was superfluous and omitted the paraphrase from the final rules.[446]

Under MPPAA, a plan sponsor's determinations are presumed correct unless it is shown by a preponderance of evidence that a determination is unreasonable or clearly erroneous.[447] Withdrawing employers criticized this presumption, arguing that plan sponsors have an incentive to find large amounts of liability and thus are not impartial and do not deserve a presumption favoring their determinations. For example, in Board of Trustees of the Western Conference of Teamsters Pension Trust Fund v. Thompson Building Materials, Inc,[448] Thompson contended that the trustees of the plan sponsor have an interest in establishing a large liability and therefore the presumption favoring their determination constitutes a denial of the employer's right to resolution of disputes before an impartial tribunal.[449] The court rejected this contention, finding that trustees do not have an institutional bias and rather have a fiduciary duty to assess withdrawal liability neutrally and reasonably.[450] The court also noted that MPPAA carefully prescribes the methods for computing liability and allows trustees discretion solely in the selection of the specific method of computation to apply in a particular case. The court held the exercise of this limited discretion insufficient to impugn the impartiality of the trustee's determinations.

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[438] § 2641.1.

[439] 50 Fed. Reg. 34686 (August 27, 1985).

[440] § 2641.13(d).

[441] § 2641.2(a)(1)(2).

[442] 29 U.S.C. 1401 (a)(1).

[443] § 2641.4(a).

[444] § 2641.4(b).

[445] 50 Fed. Reg. 34681.

[446] 50 Fed. Reg. 34681.

[447] 29 U.S.C. § 1401(a)(3)(A).

[448] 749 F. 2d 1396 (9th Cir. 1984).

The PBGC has included discovery provisions in the final regulation based largely upon the views expressed in the comments. Discovery provisions were not part of the proposed regulation. The PBGC believes that fairness will often require that discovery be available to the parties due to the nature of the withdrawal disputes.[451] The arbitrator controls the scope of discovery.[452]

The arbitrator also has discretion as to the admissibility of evidence. The proposed rules had qualified the arbitrator's discretion, however, by requiring conformity to the legal rules of evidence if the rights of the parties would be prejudiced otherwise. The PBGC omitted the qualification from the final rules because it agreed with several comments that such a requirement was unnecessary, would invite appeals based on technicalities, and would put non-lawyer arbitrators at a disadvantage.[453]

Although the arbitrator may call a prehearing conference under the final rules,[454] the PBGC is not authorized to do so as it suggested in the proposed rules. Several comments objected to the proposed authorization because it would too deeply involve PBGC in an essentially non-governmental arbitration.[455]

The arbitration hearing date must be no later than 50 days after the arbitrator accepts his appointment, unless the parties agree to proceed without a hearing as allowed under 2641.4(c).[456] The proposed time limit of 30 days had been criticized by the comments so the provision has been extended in the final rules. If the parties cannot agree on a date within a 15 day period after the arbitrator's acceptance, the arbitrator has 10 additional days to set the date.[457]

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[449] The denial of the right to an impartial tribunal violates the Fifth Amendment right of due process.

[450] 749 F. 2d at 1404-1406.

[451] 50 Fed. Reg. 34631.

[452] § 2641.4(2).

[453] 50 Fed. Reg. 34681.

[454] § 2641.4(b)

[455] 50 Fed. Reg. 34681.

[456] § 2641.5(a).

[457] § 2641.5(a).

The parties may appear in person or by counsel and will be subject to the arbitrator's order if they fail to appear or file documents in a timely manner.[458] A stenographic or taped record of the proceeding will be made upon the request and expense of any party.[459] The arbitrator must establish a procedure to allow each party full and equal opportunity to present his claims and proofs, cross-examine witnesses and file a brief.[460]

The arbitrator may reopen proceedings for good cause at any time after the close of the hearing and before the final award is rendered.[461] Although the proposed rule required the consent of both parties, the PBGC agreed with several comments which objected to giving the parties the power to frustrate the reopening.[462] The final rule, therefore, does not contain the consent requirement.

The arbitrator must make a written award within 30 days of the close of proceedings.[463] The close of proceedings is marked by either the date the hearing was closed, the date the last brief or reply brief was filed, the date the reopened proceedings were closed, or if the parties waived a hearing, the date on which final statements and proofs were filed.[464]

Two comments objected to the time limits on the arbitrator to render an award because they were unreasonably short and ambiguous. The PBGC clarified the ambiguity by explicitly defining what marks the closing of proceedings but did not adopt the time limit suggestions. The PBGC believes that the limits are adequate because it is the duty of the arbitrator to make sure before he accepts the appointment, that he will be able to render awards promptly after the close of proceedings.[465]

The arbitrator's final award must include a factual and legal basis for the his findings, adjustments for amount and schedule of payments, and a provision for an allocation of costs.[466]

The requirement in the final rules that the arbitrator state a factual and legal basis for his award is a slight revision from the proposed requirement that the arbitrator explicitly characterize his statements as "findings of fact" or "conclusions of law." Some comments argued that non-lawyer arbitrators would be burdened by making the proper categorization. The AAA also criticized the need for the arbitrator to make conclusions of law and noted, in fact, that the Federal

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[458] § 2641.5(c).

[459] § 2641.5(d).

[460] § 2641.5(e).

[461] § 2641.6(a).

[462] 50 Fed. Reg. 34682.

[463] § 2641.7(b).

[464] § 2641.7(c), (d), and (f).

[465] 50 Fed. Reg. 34682.

[466] § 2641.7(a)(1), (2), and (3).

Arbitration Act does not require it. The PBGC agreed that the requirement is of little value and, therefore, made clear in the final rules that the arbitrator need only state a factual and legal basis for the award.[467]

After the final award has been rendered, the plan sponsors are required to make copies of the awards available to the PBGC and contributing employers.[468] One comment suggested that the PBGC publish and index awards. Although the PBGC lacks the resources to comply with the suggestion, it does agree that the awards should be made public.[469]

The arbitrator's award is reviewable in a United States district court.[470] The scope of judicial review of the award is not clear under the statute, however. MPPAA § 4221(b) contains two distinct references concerning judicial review of an award.[471] § 4221(b)(2) authorizes any party to bring an action in a district court in accordance with 29 U.S.C. § 1451 to enforce, vacate, or modify an award. 29 U.S.C. § 1451 provides that a party adversely affected by the Act may bring an action in a district court "for appropriate legal or equitable relief or both." This provision for review is modified by § 4221(c), which provides that in any proceeding under § 4221(b) an arbitrator's findings of fact will be presumed correct subject to rebuttal only by a clear preponderance of evidence. Thus § 4221(b)(2), modified by § 4221(c) appears to authorize de novo review of all issues of law and review of factual findings under a clear preponderance of the evidence standard. This has been the conclusion of most courts which have interpreted the MPPAA arbitration provision.[472]

The provision for judicial review described above is confused by § 4221(b)(3). This section provides that to the extent consistent with MPPAA, arbitration proceedings are to be enforced as an arbitration carried out under the United

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467. 50 Fed. Reg. 34682.

468. § 2641.7(g).

469. 50 Fed. Reg. 34682.

470. 29 U.S.C. § 1401(b).

471. Id.

472. See, Board of Trustees of the Western Conference of Teamsters Pension Plan v. Thompson Building Materials, 749 F. 2d 1396, 1400 (9th Cir. 1984) (Court interpreted MPPAA as prescribing de novo judicial review of questions of law, while arbitrator's findings of fact are presumed correct unless rebutted by a clear preponderance of evidence.); see also, Peick v. Pension Benefit Guaranty Corp., 742 F. 2d 1247 (7th Cir. 1983) (Court rejected contention that MPPAA denies employers their right to access to courts stating that, "Arbitration is ... merely the first step in resolving conflicts arising under the Act." 742 F. 2d at 1277. The court viewed MPPAA as providing a means for encouraging parties to settle dispute and not as a means for reaching a final determination.); see also I.A.M. National Pension Fund Benefit Plan C v. Stockton TRI Industries, 727 F. 2d 1204(D.C. Cir. 1984) (Court analogized MPPAA arbitration to administrative agency action and determined the scope of review to be equal to that accorded to administrative adjudications).

States Arbitration Act.[473] The Arbitration Act provides very limited judicial review, applicable only in cases of fraud, partiality and misconduct. To date at least one appellate court has interpreted 8 4221(b) as authorizing only the limited scope of judicial review provided in the United States Arbitration Act.[474]

The courts which have interpreted MPPAA's arbitration provisions thus far have been called upon to determine the Act's constitutionality and have not actually reviewed an arbitration decision under the Act. MPPAA has been upheld against assertions that its provisions violate standards of due process;[475] deny employers access to an impartial tribunal;[476] commit a taking of property without just compensation;[477] violate the Seventh Amendments provision for trial by jury;[478] and constitute a violation of Article III of the Constitution by vesting federal judicial power in arbitrators who are not federal Article III judges.[479]

Commodity Futures Trading Commission Reparations Procedures

The Commodity Exchange Act of 1974[480] established a reparations procedure by which individuals alleging injury under the act as a result of a violation caused by a registered commodities trading professional could adjudicate their claim within the Commodities Futures Trading Commission. The Act offers this reparations procedure as an alternative to civil litigation or resort to a privately sponsored dispute resolution mechanism.

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[473] The Washington Star Company v. International Typographical Union Negotiated Pension Plan, 729 F. 2d 1502 (D.C. Cir. 1984).

[474] 9 U.S.C. 8 1 et seq.

[475] See, Pension Benefit Guaranty Corp v. R.A. Gray, 104 S.Ct. 2709(1984)(Court held constitutional MPPAA's retroactive imposition of withdrawal liability).

[476] See discussion in text, Board of Trustees of the Western Conference of Teamsters Pension Trust Fund v. Thompson Building Materials, Inc, 749 F. 2d 1396 (9th Cir. 1984); Washington Star Company v. International Typographical Union Negotiated Pension Plan, 729 F. 2d 1502(D.C. Cir. 1984); Peick v. Pension Benefit Guaranty Corp. 724 F. 2d 1247 (7th Cir. 1983).

[477] Board of Trustees of the Western Conference of Teamsters Pension Trust Fund v. Thompson Building Materials, Inc, 749 F. 2d 1396, 1406 (9th Cir. 1984) (Taking clause does not prohibit Congress from readjusting contractual relationships of private parties); accord, Peick v. Pension Benefit Guaranty Corp., 724 F. 2d 1247, 1274-1276 (7th Cir. 1983).

[478] Washington Star Company v. International Typographical Union Negotiated Pension Plan, 729 F. 2d 1502, 1511 (D.C. Cir. 1984); Peick v. Pension Benefit Guaranty Corp., 724 F. 2d 1247, 1277 (7th Cir. 1983).

[479] Board of Trustees of the Western Conference of Teamsters Pension Trust Fund v. Thompson Building Materials, 749 F. 2d 1396, 1404-1406 (9th Cir. 1984).

[480] Pub. L. 93-463.

The reparations procedure has processed approximately 1,000 claims each year since its inception in 1976.[481] From the outset, however, CEA's reparations procedures frequently resulted in long delays and backlogs.[482] Because the procedure was not providing for expeditious, inexpensive resolution of claims as intended, Congress amended the reparations provision in 1982 to grant CFTC the power to promulgate rules, regulations, and orders necessary to provide for the efficient and expeditious administration of reparations claims.[483] Under this authority, CFTC issued reparations rules, completely revising the reparations procedures originally established by CEA.[484] CFTC's current rules create a three track decisionmaking procedure including a voluntary decisional procedure analogous to commercial arbitration, a summary decisional procedure for claims of up to $10,000 and a formal decisional procedure for claims exceeding $10,000.

A person who believes he has been injured due to a registrant's violation of the Act may apply for reparations by filing a complaint with the proceeding clerk of CFTC's Office of Proceedings.[485] This complaint must contain a description of the relevant facts under which the alleged violation has occurred, a claim for damages, and an election of one of the three decisional procedures. The Office of Proceedings initially reviews the complaint and either serves it upon the named registrant, terminates the complaint, or returns it to the complainant for correction of deficiencies.[486] The Office of Proceedings may terminate a complaint only if it raises claims which are not cognizable in a reparations proceeding.

Upon receipt of a complaint a registrant must file an answer within 45 days.[487] The answer must contain a detailed statement of the facts which constitute the ground for a defense, any counterclaims, and an election of a decisional procedure. The answer also may include a motion for reconsideration of the determination to forward the complaint under which the registrant may request a review of the complaint for any patent defects such as a statute of limitations defense. The complainant is permitted thirty days in which to reply to any counterclaim.[488] The failure to answer a complaint or reply to a counterclaim acts as an admission of the allegations and waives a party's right to a decisional procedure.[489] The Office of Proceedings may designate a proceedings officer to enter findings of fact and conclusions of law, including a reparations award against a non-responding party. A default order so entered will become a final order of the Commission unless set aside within thirty days.[490] Within thirty days, a proceeding officer may set aside a default order upon a party's showing that it has a reasonable likelihood of success on the merits and that no prejudice would result from proceeding to the merits of the claim. Once thirty days have passed and a default order has become a final order of the Commission, the proceeding officer may only set it aside if, in addition to showing reasonable likelihood of success and that no prejudice would result, a party establishes that the order was obtained through fraud, mistake, excusable neglect or that the Commission lacks jurisdiction. In either case, the proceeding officer's decision may be appealed to the Commission.

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[481] Raisler, Nelson, and Wright, CFTC Reparation Rules Offer Novel Adjudication Angle, Legal Times, April 16, 1984.

[482] Id.

[483] Pub. L. 97-444, 96 Stat. 2308, 7 U.S.C § 18(b).

[484] 49 Fed. Reg. 6602-6644.

[485] 17 CFR § 12.13.

[486] 17 CFR § 12.15.

[487] 17 CFR § 12.18.

[488] 17 CFR § 12.20.

[489] 17 CFR § 12.22.

Parties may pursue discovery under each of the three decisional procedures through requests for production of documents, serving depositions on written interrogatories and requests for admissions.[491] Parties may seek all relevant subject matter not subject to a privilege, except that tax returns and personal bank account records are discoverable only upon a showing that such information cannot be obtained by other means. A party served with a discovery request may seek to limit discovery through a motion for a protective order by the Office of Proceedings. In each of the three decisional proceedings discovery must be completed within a period of sixty days after the Office of Proceedings notifies the parties of its commencement.

In the first year following institution of the new rules, from April 23, 1984, to April 30, 1985, CFTC received 441 complaints.[492] The number of complaints increased over the last six months so that CFTC projects that it will receive approximately 500-550 complaints in fiscal year 1985. Of the 441 complaints received under the current rules, 125 have been forwarded for a hearing, 254 remain pending in the Complaints Section of the Office of Proceedings and 62 have been terminated through settlement (28) or due to a complainant's failure to correct deficiencies or because the claim is barred by the statute of limitations or other patent defense.

Among the 125 cases forwarded for hearing, 56 have been pursued through the formal decisional proceeding, 46 through the summary decisional proceeding and in 23 cases the litigants have elected the voluntary proceedings.

As of June, 1985, 6 of the 56 cases following the formal proceedings have been completed. These 6 cases were all resolved through settlement on the average of 119 days after the case was forwarded from the Complaints section. No case under the formal decisional proceedings has yet concluded through judgment.

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490. 17 CFR § 12.23.

491. 17 CFR Subpart B §§ 12.30-12.36.

492. The statistics detailing the Commission's experience under the new reparations rules are taken from a Commodities Futures Trading Commission Staff Document in the form of an Informational Memorandum to the Commission from Executive Director Molly G. Bayley, "Report to the Commission on the Operation of the New Reparations Rules," June 11, 1985. In addition to the cases processed under the new reparations rules, from April 23, 1984 to April 30, 1985, the Commission also processed 320 reparations cases which had been filed prior to April 23, 1985, under the old reparations rules.

Under the summary proceedings, judgments have been reached in 4 cases out of the 46 forwarded to a judgment officer. In addition, one case was settled and another was resolved through a judgment against one party and settlement with the other parties. These case have concluded on an average of 47 days after the cases were forwarded from the Complaints section of the Office of Proceedings to the Hearings section.

Of the 23 cases following the voluntary proceedings, five have been decided by judgment officers. These decisions have been reached an average of 40 days after the cases were forwarded to the judgment officer.

In June, 1985, 254 cases were pending in the Office of Proceedings. Approximately 80 percent of these cases had been in the Office for less than six months and more than 50 percent had been in the Office for less than three months. The length of the time pending before a case is forwarded for a hearing is attributable in part to the time lags in waiting for respondents' answers and to the time spent waiting for complainants' to correct deficiencies in original complaints.

The voluntary decisional proceeding is patterned after commercial arbitration.[493] This procedure is adopted only upon the consent of both the complainant and the registrant. Under this procedure the parties waive any right to an oral hearing and any right they may have had to receive written findings of fact, Commission review or judicial review.[494] Upon the election of the voluntary proceeding, the Office of Proceedings appoints a judgment officer, who is an employee of CFTC to hear the claim.[495] This judgment officer hears all motions concerning discovery and upon close of discovery makes an award on the basis of the written documents submitted.[496] The judgment officer's final decision contains a brief conclusion concerning any alleged violation or counterclaim and an award of damages without any finding of fact.[497] No damage award may exceed the amount requested as damages by a party in its pleading. The judgment officer's decision is final; it may not be appealed to the Commission or to a court although it may be enforced in a United States district court.[498] Despite this finality, the Commission, upon its own motion, may review an award to determine that it is not the result of any fraud, partiality or other misconduct.[499] The judgment officer's conclusion concerning a registrant's violation of the Commodity Exchange Act is not a Commission finding for purposes of denying or revoking a person's registration under the Act; it is considered a final Commission order however for all other purposes and thus may have res judicata effect.

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[493] 49 Fed. Reg. 6611; 17 CFR Subpart C, §§ 12.100-106.

[494] 17 CFR § 12.100(b).

[495] 17 CFR § 12.26(a).

[496] 17 CFR § 12.101.

[497] 17 CFR § 12.106.

[498] 17 CFR § 12.106(d).

[499] 17 CFR § 12.403(b).

The summary decisional procedure is available for resolution of reparation claims of $10,000 or less.[500] In this proceeding, as in the voluntary proceeding, a Commission employee known as a judgment officer serves as decisionmaker.[501] The judgment officer plays a very active role in the summary procedure which primarily resolves disputes based upon written documentation.[502] The judgment officer rules upon discovery related motions, may conduct predecision conferences between the parties and additionally, on occasion may permit oral testimony either in person in Washington, D.C. or through a telephonic hearing.[503] Oral testimony may be received only after a party shows that oral testimony is "necessary or appropriate to resolve factual issues which are central to the proceeding."[504] The judgment officer has discretion to limit the issues upon which oral testimony will be received. At the close of the evidence, the judgment officer must issue an initial decision containing brief findings of fact and determinations of all questions of law including an award of damages.[505] Upon receipt of the judgment officer's initial decision, either party may appeal to the Commission. If no appeal is taken, or is not taken within 30 days and if the Commission does not review the decision upon its own motion, the judgment officer's decision becomes a final decision of the Commission.[506]

On appeal, the Commission reviews briefs filed by the parties and may at its discretion hear oral argument.[507] The Commission is not bound by the findings or determinations made by the judgment officer although it may summarily affirm an initial decision which is substantially correct.[508] The Commission remains free to make any findings or conclusions it deems warranted on the basis of the record developed. The Commission's decision is appealable to the United States Court of Appeals under § 14 of CEA where its findings of fact are conclusive if supported by substantial evidence.[509]

The formal decisional procedure is the most detailed of the reparations proceedings and is available for resolution of claims exceeding $10,000.[510] Under this proceeding an administrative law judge presides over a trial-type hearing and decides all claims, while a proceedings officer handles prehearing motions including ruling upon all discovery motions.[511] A proceeding officer's decisions are appealable to the ALJ assigned to the case.[512] Either the proceeding officer or the ALJ may preside over a prehearing conference for the purpose of narrowing the issues for hearing or encouraging settlement or the use of the voluntary decisional procedure.[513]

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[500] 17 CFR § 12.26(b).

[501] Id.

[502] 49 Fed. Reg. 6613.

[503] 17 CFR § 201.

[504] 17 CFR § 12.209.

[505] 17 CFR § 12.210.

[506] 17 CFR § 12.210(d).

[507] 17 CFR § 12.401.

[508] 17 CFR § 12.406.

[509] 7 U.S.C. § 18.

[510] 17 CFR § 12.26(c).

An administrative law judge presides over the hearing[514] and has the power to dispense with oral testimony concerning any factual issues that can be resolved solely through review of submitted documentary evidence.[515] However, as a rule, administrative law judges are expected to allow the opportunity for full oral hearings.[516] At the hearing, the parties may conduct direct and cross-examination and introduce any documentary evidence which is relevant, material and reliable.[517] All hearing proceedings are recorded and transcribed under the supervision of the ALJ.[518] At the close of the hearing the ALJ may request the parties to file proposed findings of fact and conclusions of law.[519]

At the conclusion of the proceeding, the ALJ issues an initial decision containing findings of fact and conclusions of law.[520] The ALJ's decision becomes a final decision of the Commission unless a party appeals to the Commission within thirty days or the Commission itself moves to hear the case.[521] The Commission's power to review an ALJ's decision is the same as its power to review initial decision's developed in the Summary Decisional Procedure. The Commission receives briefs and at its discretion hears oral argument and ultimately may make any findings or conclusions which it determines are warranted by the record. A decision of the Commission is reviewable in the United States Courts of Appeals under § 14 of the CEA where the Commission's findings of fact are conclusive if supported by substantial evidence.[522]

Superfund Arbitration.

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[511] 17 CFR §§ 12.300-12.304.

[512] 17 CFR § 12.302.

[513] 17 CFR § 12.303-304.

[514] 17 CFR § 12.304, 312.

[515] 17 CFR § 12.311.

[516] 49 Fed. Reg. 6616.

[517] 17 CFR § 12.312(d).

[518] 17 CFR § 12.312(f).

[519] 17 CFR § 12.312(g).

[520] 17 CFR § 12.314.

[521] 17 CFR § 12.314(d).

[522] 7 U.S.C. § 18 (1982).

The Comprehensive Environmental Response, Compensation and Liability Act[523] (CERCLA or Superfund) relies upon arbitration to resolve conflicts arising from the Environmental Protection Agency's Administrator's determinations of claims asserted against CERCLA's Hazardous Substance Response Trust Fund.[524]

The Superfund Act created a Trust Fund to pay for the clean up of hazardous waste spills and disposal sites.[525] The Trust Fund may be used to pay the federal government's costs to clean up hazardous waste sites, the costs incurred by any person responding to actual or threatened hazardous substance releases and the costs incurred by a state or federal agency in restoring, rehabilitating or replacing natural resources harmed as a result of a hazardous substances release.[526] A person who has responded to a hazardous substance release or a state responsible for restoring natural resources harmed by a release may assert claims against the fund whenever they have not recovered from any other potentially liable party. EPA may award claims for response costs incurred by any person so long as the costs were expended in compliance with the National Contingency Plan of the Clean Water Act and were preauthorized by EPA. EPA may pay the costs incurred by a state acting as trustee of natural resources so long as they were expended either in accordance with a plan developed under CERCLA or in response to an emergency.

Upon presentation of a claim, the EPA administrator, must attempt to negotiate a settlement and if unsuccessful, make an award from the fund or deny the claim.[527] The administrator must submit denied claims for arbitration.[528] A claimant may request arbitration of an award the claimant finds unsatisfactory.[529]

Under CERCLA, the President must establish a Board of Arbitrators to hear claims.[530] The members of this Board must be selected in accordance with procedures utilized by the American Arbitration Association. CERCLA authorizes an arbitrator to conduct informal public hearings and issue written decisions.[531] The Act provides for judicial review of arbitrators' decisions in a United States district court. The district court is to uphold an arbitrator's decision unless it finds that decision constitutes an "arbitrary or capricious abuse of the members' discretion."[532]

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[523] Pub. L. 96-510; 94 Stat. 2767 (1980); 42 U.S.C. 9601 et. seq.

[524] The arbitration provision is found in Sec. 112(b)(4).

[525] 42 U.S.C 9631-33.

[526] CERCLA Sec. 11i(a).

[527] CERCLA Sec. 112(b)(2)-(3).

[528] CERCLA Sec. 112(b)(3).

[529] Id.

[530] CERCLA Sec. 112(b)(4)(A).

[531] CERCLA Sec. 112(b)(4)(B)-(D).

The Environmental Protection Agency issued a proposed rule to establish procedures for the conduct of arbitration on March 8, 1985,[533] followed by a 60-day comment period. EPA made minor alterations to the rule and published the final rule on December 13, 1985.[534] The rule provides that the EPA Administrator will appoint the members of the Board of Arbitrators.[535] The Administrator will screen applicants for membership to the Board by evaluating such criteria as background in hazardous substances or administrative procedures.[536] In compliance with CERCLA, the Administrator will forward the names and qualifications of those applicants he selected to the American Arbitration Association (AAA).[537] If the applicant meets the requirements of AAA, his name will be returned to the Administrator for possible appointment to the Board.[538] Board members will receive three year appointments and serve at the pleasure of the Administrator. Board members may be removed for any reason the Administrator deems appropriate except that a member may not be dismissed during the pendency of a claim in the absence of a showing of bias, personal or financial interest. The total number of arbitrators or board members will be determined by the Administrator.

A member of the Board may arbitrate a claim in one of two situations: (1) whenever the Administrator denies a claim; or (2) whenever a person dissatisfied with an award requests arbitration. The arbitrator may only make awards which are compensable from the Fund under CERCLA's complex scheme. Thus the arbitrator may not award claims which would reverse EPA decisions concerning the preauthorization of claims under the National Oil and Hazardous Substances Contingency Plan and may not award costs for the harm caused to natural resources unless the costs are distributed under a plan developed under CERCLA or were expended in response to an emergency.[539]

The proposed rule limits the arbitrator's role to fact finding.[540] In deciding a claim, the Board must apply legal standards as prescribed by EPA in the "summary of applicable standards and principles" which EPA must develop for each claim.[541] The rule also directs the Board to accord "substantial deference to EPA decisions as reflected in the administrative record."[542] Additionally, the rule absolutely prohibits the Board from reviewing an Administrator's decision to deny a claim whenever that decision is made "based on competing priorities for the expenditure of Fund monies."[543] Finally, claims by other federal agencies are not eligible for adjudication by the Board.[544]

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[532] CERCLA Sec. 112(b)(4)(G).

[533] 50 Fed. Reg. 9586.

[534] 50 Fed. Reg. 51196.

[535] 40 CFR 305.20(a).

[536] 40 CFR 305.20(b).

[537] 40 CFR 305.20(b).

[538] Id.

[539] See 40 CFR 305.21.

[540] 50 Fed. Reg. 51198.

[541] 40 CFR 305.21(g).

The Administrator must submit all denied claims to the American Arbitration Association within five days.[545] The Administrator must include with this denial an explanation of the decision, a statement of the legal standard applicable to the claim, any other supporting documentation which EPA deems necessary to explain the reason for denial and, if known, the identity of any potentially responsible parties. At this time the Administrator may also request AAA to use expedited procedures to hear any claim involving $20,000 or less.[546]

A claimant dissatisfied with the Administrator's award may initiate arbitration by submitting the claim to AAA within 30 days of the Administrator's decision.[547] The claimant's submission must include an explanation of the matter and amount in dispute, and the remedy sought. The claimant must also include a copy of the Administrator's decision, any supporting documents the claimant deems necessary to support its claim and the identity of any potentially liable parties, if known.[548] Within 5 days of receipt of a claim, AAA must notify the other party of the dispute's existence by sending that party a copy of the claim.[549]

Once the claim has been submitted, AAA will distribute to the parties a list of potential arbitrators drawn from the Board of Arbitrators.[550] After the parties have an opportunity to rate these members in order of preference, AAA will invite the parties to accept one arbitrator from the list to hear the claim. If the parties do not agree upon an arbitrator, AAA may appoint a member to hear a claim. Arbitrators must immediately disclose to AAA any circumstances likely to affect impartiality including any bias or personal or financial interest or past relationship with the parties, their counsel, or any potentially responsible party.[551] AAA will share this information with the parties but retains sole discretion to decide whether an arbitrator should be disqualified due to bias or interest.

The responding party to an arbitration has seven days after receipt of the notice of the claim to file an answer.[552] If arbitration is initiated by a claimant, EPA must file a statement detailing the applicable legal standards and principles governing the dispute. Either party may file an amended pleading after arbitration has been initiated, however, once the arbitrator has been appointed new claims may only be added with the arbitrator's consent.[553] Whenever an amended pleading is filed, the other party has seven days from the date of receipt of such pleading in which to file an answer.

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[542] 40 CFR 305.21(h).

[543] 40 CFR 305.21(f).

[544] 50 F.R. 51199.

[545] 40 CFR 305.30(a).

[546] 40 CFR 305.30(b).

[547] 40 CFR 305.30(a).

[548] 40 CFR 305.30(c).

[549] 40 CFR 305.30(d).

[550] 40 CFR 305.31.

[551] 40 CFR 305.32.

Either the arbitrator or the parties may request a prehearing conference.[554] At such a conference the parties are expected to arrange for the exchange of information, including witness statements, exhibits and documents, and to stipulate to uncontested facts in an effort to expedite the proceeding. Arbitrators may encourage further settlement discussions during the prehearing conference to expedite the arbitration proceedings.[555] The hearing must take place at a site selected by the administrator with due consideration to any requests by the claimants and it must occur no more than 60 days after the arbitrator's appointment.[556] The arbitrator is responsible for making a full record of the hearing proceedings. The hearing consists of direct examination of witnesses, cross-examination and the submission of documentary proof. The parties may offer any evidence they wish, subject to reasonable limits established by the arbitrator. The arbitrator may receive the evidence of witnesses by affidavit, interrogatory, or deposition. If the arbitrator determines that an inspection or investigation is necessary, the arbitrator may request that the Administrator conduct an investigation or inspection under CERCLA § 104(b). The administrator decides whether or not to go forward with such an investigation or inspection.

The arbitration may even proceed in the absence of any party, who after due notice fails to be present, fails to obtain an adjournment, or fails to have evidence presented on his behalf. The party will be deemed to be in default and the arbitrator will require the party who is present to submit such evidence necessary for the arbitration to make an award.[557]

After the parties have completed their presentations the arbitrator may close the hearing, or request the submission of briefs or additional documents.

The arbitrator must make his decision within 90 days of the submission of the claim to the Board.[558] This period may be extended upon consent of all parties or by the Administrator when a large number of claims arising from a single incident or set of incidents have been consolidated for hearing. The arbitrator's decision must be written and contain a full statement of the basis and rationale for the arbitrator's determination.

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552. 40 CFR 305.40.

553. 40 CFR 305.40(b).

554. 40 CFR 305.41.

555. 40 CFR 305.41.

556. 40 CFR 305.42.

557. 40 CFR 305.42(i).

558. 40 CFR 305.43(a).

Expedited procedures are used to resolve claims that do not exceed $20,000, unless the Administrator demands full procedures.[559] In addition, the parties may consent to the use of expedited procedures to resolve claims of more than $20,000. The $20,000 figure refers to the amount in dispute between the claimant and EPA, regardless of the amount of the original claim.[560] The expedited procedures differ from the full arbitration procedures in that the parties agree to receive all required notices by telephone, followed by written confirmation. In addition, the arbitrator selection process is streamlined in that AAA submits a list of five potential arbitrators to each party from which each party may strike two. AAA will then appoint an arbitrator who will serve, subject to any finding of partiality, bias or interest requiring disqualification. The hearing must commence within 60 days of the selection of the arbitrator. Most expedited cases will be heard within one day. The arbitrator's decision is due five days after the close of the hearing unless the parties agree to an extension.

The arbitrator's decision, whether rendered under the full procedures or under the expedited procedures, may be appealed to the United States district court in the district in which the arbitration took place.[561] CERCLA instructs the courts that an award or decision of a member of the Board is binding and conclusive and is not to be overturned except in cases of arbitrary or capricious abuse of the member's discretion. CERCLA further provides that the arbitrator's decision is to have no collateral effect. An arbitrator's award is not admissible as evidence of any issue of fact or law in any other proceeding under CERCLA or any other provision of law.[562]

Finally, § 305.52 of the final rules includes additional miscellaneous provisions. Parties to arbitration must make objections, whether oral or written, at the earliest possible opportunity or will be deemed to have waived the right to object.[563] The final rules also forbid the Administrator, the parties and other interested persons from engaging in *ex parte* communication with the arbitrator.[564]

Merit Systems Protection Board.

Background. Congress passed the Civil Service Reform Act of 1978 (CSRA or Act),[565] to promote a more efficient "civil service while preserving the merit principle in Federal employment."[566] The Act abolished the Civil Service Commission and replaced it with the Merit Systems Protection Board (MSPB or Board). Under the CSRA, the Board is an independent, quasi-judicial regulatory agency created to protect the Federal merit systems from political abuse and to resolve employee grievances within the systems.[567]

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[559] 40 CFR 305.50(a).

[560] 50 *Fed. Reg.* 51200.

[561] CERCLA Sec. 112(b)(4)(G); 40 CFR 305.51(b).

[562] *Id.*

[563] 40 CFR 305.52(a).

[564] 40 CFR 305.52(b).

[565] 5 U.S.C. §§ 1101-8911 (Supp. IV 1980).

To resolve employee grievances, the MSPB began with a formal appeals procedure (FAP) established under the CSRA. The Board, however, examined alternatives to the FAP because of Congressional interest in expediting the personnel actions subject to the Board's appellate jurisdiction.[568] Illustrative of Congressional intent is the Senate report, accompanying CSRA, urging the MSPB to develop alternative methods for resolving appealable matters including "suitable forms of conciliation, mediation, arbitration, and other methods mutually agreeable to the parties."[569]

In 1981, a new chairman of MSPB, familiar with "expedited arbitration" as used by unions, began to focus discussion on that procedure as interest in it increased during the Air Traffic Controllers (ATC) union strike. The appeals from the strikers, terminated from federal employment, eventually increased threefold the FY 81 caseload of the MSPB.[570] With the assistance of the Administrative Conference of the United States (ACUS), the MSPB began development of what became the "Appeals Arbitration Procedure" (AAP). The AAP, later modified as the "Voluntary Expedited Appeals Procedure" (VEAP), is an alternative to the more formal appeal procedure (FAP). The Board's objective was to design an informal, simplified, less costly system to adjudicate routine, non-precedential appeals while preserving fair, impartial forums. The Board's expectations are reflected in its statement of goals and objectives:

- The system will not only be fair and fast, but also one which is recognized and accepted as such by employees and agency management.

- It will encourage the informal resolution of disputes in the proceeding, including settlement by agreement between the parties.

- It will cover as many kinds of appealable matters as are feasible for resolution through the more informal process.

- It will improve the timeliness and cost-effectiveness of the process leading to the resolution of disputed personnel actions.

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566. S. Rep. No. 969, 95th Cong., 2d Sess. 2, reprinted in 1978 U.S. Code Cong. and Ad. News 2723, 2724 (hereinafter, S. Rep. No. 969).

567. S. Rep. No. 969. The powers and functions of the MSPB are set out in 5 U.S.C. § 1205 (Supp. IV 1980).

568. Pub. L. 95-454, 92, Stat. 1111 (1078).

569. S. Rep. No. 969.

570. In Fiscal 1981, the MSPB issued 5,610 decisions at the regional level as part of the regular caseload and received 10,356 Air Traffic Controller Appeals. U.S. Merit Systems Protection Board, Study of MSPB Appeals Decisions In FY 1981, December 1982 cited in Adams, supra note 170.

- It will exclude sensitive cases requiring more intense adjudicative proceedings, based on the nature, gravity and complexity of the issues involved.

- It will preserve the parties' rights to limited Board review of major procedural and legal errors in the arbitration award.[571]

The MSPB introduced its proposal for the AAP in October 1982 to Federal agencies, unions, bar associations, and public interest groups.[572] Comments were requested and received in December 1982. MSPB modified the plan after reviewing comments and distributed a new version, Bulletin No. 12, for public comment on January 13. MSPB received comments on Bulletin No. 12 through January and February and published interim final rules effective in the Federal Register on March 18, 1983, announcing the introduction of appeals arbitration (AAP), and a pilot study of the procedure to be conducted in four MSPB regions.[573] Comments were invited through July 1, 1983. The preamble to the interim rules did not discuss the comments MSPB received nor reasons for changes from the earlier drafts.

Several important revisions of the early proposals were included in the interim final rules.

MSPB originally took the position that the AAP would only be available to those appellants who were not members of a certified collective bargaining unit. The major concern of union comments was that it would be "discriminatory" and "anti-union" to only provide AAP to non-union members. In the interim final rules, MSPB extended AAP eligibility to include the union appellants.
Perhaps the most important revision from the agency's viewpoint was the proposal in Bulletin No. 12, and retained in the interim rules, to allow agencies a choice in whether AAP would be used. Originally, agencies would have been required to participate in AAP if the Regional Director so directed. All but one agency commented that agency agreement should be necessary. Unions still favored unilateral election of the AAP by the employee.[574] MSPB compromised in Bulletin No. 12 in proposing that if an employee elected AAP, the final decision would be made by the Regional Director after review of the petition for appeal and the agency's response.

Another revision involved the parties' right to petition the full Board for a review of the initial decision. Initially MSPB proposed that the Board would not reconsider any AAP case with the exception of those requested by the Office of Personnel Management. Other appellants could file civil suits from the arbitration decision with a Circuit Court of Appeals or with the U.S. Court of Claims. Both agencies and unions, in their comments, objected to the lack of appeal to the Board. In Bulletin No. 12, the MSPB proposed a change allowing either party to file a petition for review to the full Board if the party could (1) demonstrate harmful procedural irregularity in the proceedings before the arbitration, or (2) demonstrate clear error of law.[575] The interim rules retained this change.

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[571] Merit Systems Protection Board, 48 Fed. Reg. 11399.

[572] The packet was entitled Voluntary Arbitration: An Alternative to Resolution of Employee Appeals.

[573] 48 Fed. Reg. 11399. The four MSPB cities were San Francisco, Chicago, Seattle, and Denver. Dallas later joined the pilot program.

[574] Lawson, Roseann, Evaluation of the Merit Systems Protection Board's Appeals Arbitration Procedure, p. 11.

Appeals Arbitration Procedure. The election of the AAP begins with the agency's notice of proposed action. The notice explains to the employee his right to appeal and his option of using the FAP or AAP. The employee has 20 days to appeal and has two chances to request appeals arbitration; first, at the time of filing a petition for appeal, or, second, within 10 days from the date of the Board's order of acknowledgement to the agency. The agency has 15 days from the date of the Board's order to consent or decline to use AAP. Upon consenting, the agency must file a designation of representative form and a summary of facts and legal issues raised in the appeal. Final decision to process the case under AAP or the FAP is left to the regional director after review of the petition for appeal and the agency's response. The regional director or his designee retains the right to convert the case to a formal appeals procedure (FAP), at any time prior to issuance of the arbitration award, in the event circumstances warrant.[576]

If the appeals arbitration procedure is granted, the regional director will appoint an arbitrator, on a rotating basis, from a panel of presiding officials who are designated for the new procedures and have received special training.[577]

The initial role of the presiding official is that of mediator; to explore the potential for a settlement and to encourage the parties to settle the case voluntarily. If an informal settlement cannot be reached, the presiding official will assume the role of arbitrator and proceed with the hearing if one has been requested. The parties may still reach a voluntary settlement agreement at any time until the issuance of an arbitration award.[578] If the parties voluntarily resolve the dispute without an award, the settlement agreement is final and binding and the appeal will be dismissed with prejudice. If the terms are recorded and signed, they will be made part of the arbitration record and the Board will retain jurisdiction to ensure compliance with the agreement. If the settlement is not recorded, the Board will not retain jurisdiction to ensure compliance.[579] The presiding official has the authority to take all necessary action to conduct a speedy, fair, and impartial hearing and, unless expressly provided otherwise in the regulations, to follow the regulations under 5 CFR Part 1201, Subpart B.[580]

Unique to the AAP is the requirement of both parties to file a Joint

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575. The formal appeals procedures (FAP) uses the less restrictive review standard: "contrary to law, rule or regulation."

576. § 1201.201(a)(b)(c).

577. 48 Fed. Reg. 11399. The training of presiding officials and regional directors for the four pilot study sites was held at MSPB headquarters in Washington, D.C. on March 14 and 15, 1983, three days prior to the introduction of the program.

578. § 1201.216(a).

579. § 1201.216(b)(1)(2).

580. § 1201.204 (C)(D).

Arbitration Record (JAR) with the purpose of bringing the parties together to narrow and focus the issues in dispute. The JAR is to be filed within 30 days from the date of the Board's order of acknowledgement and should include a statement of issues, witness lists, a request for hearing and two possible dates for the hearing.[581] Informal discovery will usually precede preparation of the JAR. While the rights to formal discovery are waived by the parties in electing to use the AAP instead of the FAP, the parties have the duty to include all known relevant materials with their submissions.[582]

Either party may request a hearing which is to be held at the employment site and must be scheduled within a 15-day period following the due date, or receipt, of the JAR.[583] The AAP hearing is similar to but more informal than that under the FAP. Formal rules of procedure do not apply but may be liberally construed and used as a guide to admissibility of evidence, motions, filings of briefs, etc.[584]

Agencies are required to make their employees available as witnesses when requested by the presiding official.[585] The arbitrator may also request the production of additional information or witnesses if needed for resolution of the matter.[586] In the event a party fails to cooperate, the presiding official may impose appropriate sanctions.[587]

Unlike the Formal Appeals Procedure, MSPB keeps no official transcript of the AAP hearing, although the parties may provide for an unofficial one with use of a tape recorder or court reporter.

The record is closed at either (a) the conclusion of the hearing or, if no hearing has been convened, (b) on the date set for receipt of submissions of the parties. The presiding official has discretion to accept additional evidence or arguments after the closing of the record if it can be shown that the new and material evidence was not available prior to closing of the record.[588]

The presiding official is to issue the arbitration award no later than 30 days from the date the JAR was received by the Board, (60 days from the date of the acknowledgement order) which is half the time allowed under the FAP.[589] If no hearing was conducted and settlement was not reached, the presiding official is to issue a written decision within 15 days after the record is closed.[590] The decision is to be briefer in scope than it is under the FAP due to its non-precedential character and reliance on the joint record. It is to include a summary of the basic issues, findings of fact and conclusions of law, a holding affirming, revising or modifying the appealed action, and an order of appropriate relief.[591] The award will become final after 35 days if no petition for review is filed.[592]

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[581] § 1201.202(c).

[582] 48 Fed. Reg. 11400.

[583] § 1201.205(a)(c).

[584] 48 Fed. Reg. 11400.

[585] § 1201.206(a).

[586] 48 Fed. Reg. 11400.

[587] § 1201.213.

[588] § 1201.215(a)(b)(c).

[589] § 1201.204(b).

Under the interim rules, the Board would grant only a limited review of the decision of the presiding official. By electing the AAP, the parties waived their right, which was available under the FAP, to petition for review on grounds of new and material evidence.[593] The Board would only grant review of a petition which established: (a) demonstrated harmful procedural irregularity in the proceedings before the arbitrator, or (b) clear error of law. The Board will issue a final decision no later than 15 days from the close of the respondent's filing deadline. The appellant retains the right under the AAP to file an appeal of the final order or decision of the Board with the U.S. Court of Appeals.[594]

Voluntary Expedited Appeals Procedure. In response to early evaluation findings, the MSPB made several modifications to the AAP in July 1984, before the pilot study was completed. First, the name of the AAP was changed to "the voluntary expedited appeals procedure" (VEAP) to reduce the confusion of the AAP with labor arbitration and to emphasize the parties' right of choice. Second, the MSPB also changed the standard of review of VEAP decisions to be uniform with those of the FAP to ensure fairness regardless of forum. Finally, the MSPB extended the time allowed for its final decision on a petition for review from 15 to 35 days to conform to that permitted by FAP.[595]

Evaluation of Appeals Arbitration. The success of the AAP program can be measured by using the MSPB's statement of goals and objectives for the AAP as a basis for evaluation. It reflects an interest in providing federal employees and agencies with a more expeditious, less costly means of resolving personnel disputes while also affording a fair, impartial forum for hearing these disputes. From the MSPB perspective, employee rights should be balanced against the efficiency of the system.[596] The MSPB would also measure success by the

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590. § 1201.217.

591. § 1201.217.

592. § 1201.217.

593. The waiver requirement was dropped in July, 1984 as a result of the AAP's modification.

594. § 1201.221.

595. The provisions for judicial review are found in 5 U.S.C. § 7703.

596. Meeting of Roseann Lawson and Paul D. Mahoney,, Assistant Managing Director for Management, MSPB, April 19, 1983. Cited in Lawson, Evaluation of the Merit Systems Protection Board's Appeals Arbitration Procedures, Part II - Introduction, p. 19.

number of parties who use the procedure time after time.[597]

At the onset of the program, agencies and appellants shared the concern that procedural and substantive equity might be affected in an expedited procedure and would measure success by fairness to the parties. They would consider the procedure a success if the elements of "due process" were preserved while ensuring that the outcomes remain consistent to those of the more formal procedure.[598] One attorney, who represented employees, believed that to be successful and fair, decisions of presiding officials should reflect the facts and issues raised in the JAR and in the proceedings.[599] Another commentator suggested that the AAP will be successful if it is attractive and workable for inexperienced representatives and pro se appellants.[600] Another appellant's attorney believed that for the AAP to be a success, the presiding officials' awards should withstand judicial review.[601] Finally, from the Congressional perspective, the AAP would be labeled successful if the procedure could get away from the confrontational mode that exists at present and if the procedure could reduce costs.[602]

A study evaluating the AAP pilot program was conducted by the Public Policy Program of the George Washington University under contract with the Administrative Conference of the United States. The study was conducted to evaluate the success of the AAP in achieving the objectives mentioned above. It focused on measures of timeliness, cost effectiveness, equity and fairness. The following is a summary of the study's findings and recommendations.

The study applied a classic evaluation model by treating all AAP appeals cases as members of the experimental group matched against a control group consisting of similar FAP cases in the same regional site. The FAP cases used in matching were chosen from those that were eligible for the AAP but instead followed the FAP. The guidelines used for matching encouraged selection of FAP cases which would have used roughly the same resources if converted to AAP.[603] The study intended to isolate the true effects of the AAP.

The matching process began on July 1, 1983, in the four MSPB regions, and then after October 1, 1983, in the Dallas region which joined the pilot program late. The matching stopped on March 31, 1984. Fifty-four appeals cases formed the experimental groups.[604]

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[597] Paul Trayers, Labor Counsel, MSPB at MSPB Training Session, March 15 and 16, 1983. Lawson, p. 19.

[598] Adams, supra note 170 at 37.

[599] Interview with Joseph Gebhardt, attorney practicing before the Board, May 2, 1983. Lawson, p. 19.

[600] Edward Passman, attorney practicing before the Board in April 18, 1983 article in Federal Times. Lawson, p. 20.

[601] Interview with Joseph B. Scott, attorney practicing before the MSPB, May 18, 1985. Lawson, p. 20.

[602] Interview with James Cowen, Chief Counsel, Subcommittee on Civil Service and General Services, Senate Government Affairs Committee at the time of the debate and passage of the Civil Service Reform Act. Mr. Cowen was the minority counsel to the Subcommittee. Lawson p. 21.

[603] Adams, supra note 170 at 41.

The data used to develop the measures of the AAP's timeliness, cost-effectiveness, and equity and fairness were drawn from administrative records and surveys. The observed differences between the two groups in the four measures of success were tested statistically to determine if they reflect differences due to the appeals procedures used or merely differences due to random error.[605] The statistical findings were supplemented by field observations of the implementation of the AAP.

Implementation of the AAP. The study assessed how faithfully the design of the AAP program had been followed in the field and examined departures from the design to measure the impact on the program's success.

The results were mixed. The MSPB found that it could increase the number of parties exposed to AAP by being flexible in allowing parties to use the AAP even after the election time expired. As a consequence, however, the presiding officials and the parties themselves felt extra pressure to meet the 60 day schedule.[606] The MSPB was also flexible in solving the logistical problems of creating a JAR by allowing the parties to submit separate statements.[607]

The presiding officials varied in their emphasis on their roles as mediators in effectively facilitating voluntary settlements.[608] The study group has recommended more extensive training of the presiding officials.

The study also found that the regions applied different AAP eligibility standards. San Francisco, for example, was very strict in accepting the expediting appeals cases and in closing the appellants' ten-day window for electing AAP. The study group has recommended setting a uniform standard closer to the more flexible one applied in Chicago and Dallas.[609] The experience in Chicago indicated that persistent outreach efforts by MSPB officials also can significantly increase the number of agencies and appellants electing to use the AAP. During the 18 month study, only 102 appeals, just over two percent, of 4,475 appeals filed, were processed under the AAP and VEAP. Chicago handled 59.3% of the total.

Timeliness and Cost-Effectiveness. The study found that the AAP is unequivocally more expeditious than the FAP. The AAP cases in the pilot study were processed in less than half the time of their matched FAP cases.[610] Also, the odds of cases reaching voluntary settlement are one out of seven, which is better than twice those in similar FAP cases.[611]

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[604] The distribution of appeals was as follows: Chicago - 32, Dallas - 4, Denver - 1, San Francisco - 15, and Seattle - 2.

[605] The statistical procedure employed was a "pair wise test of mean differences for correlated samples" from T. H., Wonnacott and R. J. Wonnacott, Introductory Statistics, 2nd ed., New York: John Wiley and Sons, Inc., 1972, pp. 171-173. Adams, supra note 170 at 58.

[606] Adams, supra note 170 at 92.

[607] Id. at 62.

[608] Id. at 92.

[609] Id.

For the MSPB, the AAP is clearly cost-effective at a savings of over 40 percent per case. The agencies have also found the procedure to be less costly in cases where travel was required, where a hearing was requested and witnesses called, and when there was an interest in voluntary settlement.[612] The savings for the appellants was difficult to judge due to the variance among the appeals observed. The difference from the FAP is not statistically significant for that group.

Equity and Fairness. The study focused on whether the gains of cost-effectiveness and time came at the expense of equity and fairness in both substance and procedure. These issues were examined using data drawn from administrative records and mail survey of experimental and control groups.

One of the most important concerns of agencies and appellants was whether the AAP decisions would be consistent with those under the FAP. The study made an indirect test by describing the likelihood that the appeals decision would support the initial agency decision in matched AAP and FAP cases. No difference in the outcome was observed.[613]

Another measure of equity was whether AAP was more accessible to appellants who wished to represent themselves. The results do not point to pro se appellants' ready adoption of the AAP where only 25% of the experimental (AAP) group involved pro se appellants compared to 39% pro se appellants in the control group and 29% pro se appellants in a larger group of FAP cases in the five study sites.[614] The study recognizes that appellants have strong incentives under both procedures to employ counsel.

Another measure of equity is the parties' continued willingness to use the AAP. While the evidence does not indicate a steady increase in the number of appeals adjudicated under the AAP, it does show a continued willingness to use the procedure. In Chicago for example, at least seven agencies consented to use the AAP a second time after using it once.[615] The reason the overall number of cases adjudicated under the AAP remained low was that many of the agencies were reluctant to try the AAP at all. Throughout the pilot study, agencies in three study sites for example consented to use the AAP in little more than ten percent of the appeals eligible whereas appellants consented in no fewer than 25%

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[610] Id. at 95.

[611] Id. at 96.

[612] Id. at 121.

[613] Id. at 120.

[614] Id. at 127.

[615] Id. at 130.

of the cases.[616]

Both the appellants and the agencies who used the AAP were also relatively satisfied with the fairness of the various procedural steps of the AAP. The first procedural step examined was the preparation of the Joint Arbitration Record which is unique to the AAP and intended to bring the sides together to reduce and focus the areas of dispute. The presiding official's response was that the JAR worked "reasonably" well despite initial logistical problems. The agencies and appellants also agreed that the JAR expressed all the important facts and issues but more so from the agency's perspective than the appellants'.

Initially, the parties had expressed concern about the AAP's requirement that they waive their rights to formal discovery which is available, if necessary, under the FAP. The parties' response to the study's questionnaire revealed that less than half of the appellants felt they were able to obtain the information needed to prepare the JAR while six out of ten agency representatives either agreed or strongly agreed that they were able to get the needed information. In comparison to the responses from the FAP group, the AAP fared well although the difference is not statistically significant.[617]

The parties were also satisfied with the use of the informal hearing under the AAP. There is no significant difference in satisfaction between the AAP and FAP in this respect. This response is consistent with the presiding officials' observations that they had already considered the FAP hearings to be rather informal.

Finally, there was some concern that fairness might be sacrificed in the expedited schedule that parties are required to follow in presenting their case. Although the parties responded favorably to the question of whether the AAP allowed enough time for presenting an appeal, their satisfaction is significantly less than the parties appealing under the FAP.[618]

The study found that the parties' general perception was that the AAP was fair and equitable. Seventy-six percent of the appellants strongly agreed or agreed that the AAP was equitable and eighty percent of the agency representatives reached the same conclusion.[619] A comparison of these responses to the responses from the control group showed no statistical difference in the level of the parties' satisfaction.

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[616] Id.

[617] Id. at 136.

[618] Id. at 141.

[619] Id. at 142.

APPENDIX III
AGENCY OVERSIGHT OF PRIVATE DISPUTE RESOLUTION MECHANISMS

Securities and Exchange Commission Oversight of Self Regulatory Organizations

The Securities and Exchange Commission oversees the activities of the national securities exchanges and the over the counter securities markets. The SEC's relationship with the exchanges is referred to as self-regulation oversight. As one commentator notes:

> Under a commonly held perception of this relationship, the exchanges and the National Association of Securities Dealers (NASD) supervise their respective markets while the Commission asserts its reserve power only if the SRO's (self-regulatory organizations) initial exercise of authority is inadequate.[620]

In an often quoted passage William O. Douglas, one-time Chairman of the SEC and later Supreme Court Justice describes the relationship between the exchanges and the SEC:

> The exchanges would take the leadership with Government playing a residual role. Government would keep the shotgun, so to speak, behind the door, loaded, well oiled, cleaned, ready for use but with the hope it would never have to be used.[621]

This general description of the SEC's role in the regulation of securities markets may understate the central position the SEC actually holds in the field of securities regulation. Although the emphasis is upon self-regulation, the SEC plays more than a residual role. The SEC's power over this self regulation is clearly set forth in the Securities Reform Act of 1975. This Act sanctioned the Commission's broad authority over the exchanges. An exchange must apply to the Commission to register as a national securities exchange.[622] The Commission is also empowered to "abrogate, add to, and delete from the rules of a self-regulatory organization as may be necessary to insure the fair administration of the SRO and to insure compliance with the Securities Exchange Act."[623] The Commission must also receive notice of all disciplinary actions taken by SRO's against their members and is empowered to review these actions. The Commission may also review denials of membership or participation in an SRO. Finally, the Commission may suspend, revoke, censure or impose limitations upon the activity of an SRO if it finds "after notice and opportunity for hearing, that such self-regulatory organization has violated or is unable to comply" with the Securities Exchange Act or rules promulgated under it, or the SRO's own rules.

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620. David A. Lipton, The SEC or the Exchanges: Who Should Do What and When? A Proposal to Allocate Regulatory Responsibilities for Securities Markets, 16 UC Davis LR 527, 528 (1983).

621. Id. quoting W. Douglas, Democracy and Finance 82 (1940) (speech delivered on May 20, 1938).

622. 15 U.S.C. 78s(b)(1).

623. 15 USC 78s(c).

The Commission also may at its discretion conduct investigations to determine whether any person has violated, is violating or is about to violate any provision of the Security Exchange Act, its rules or the rules of a National Securities Exchange. The Commission may not, however, seek an injunction or mandamus order against any person for violation of a rule of a national securities exchange unless that exchange is unable or unwilling or otherwise has not taken such action.[624] Thus the Commission has significant power with which to exercise oversight over the self-regulatory organizations.

An example of the interaction between the Commission and the exchanges is the experience of the SEC's encouragement of the use of arbitration for the resolution of disputes between registered broker-dealers and their customers. Binding arbitration clauses are not enforceable with respect to Federal Securities laws,[625] but the Commission has strongly endorsed the use of "fairly administered arbitration procedures as the most cost effective means of resolving certain disputes between broker-dealers and their customers."[626]

On June 9, 1976, the Commission invited comments concerning the development of a nationwide dispute settlement procedure for resolving disputes between registered securities broker-dealers and their customers.[627] The Commission sought to establish a uniform system for resolving disputes involving small claims to be administered by the SROs. The Commission explained "this system could provide for the efficient and economical disposition of grievances and should not be burdensome, complex or costly to the investor; in other words, the system could function in a manner similar to a small claims court." The Commission anticipated that "a streamlined dispute grievance procedure will increase the effectiveness of existing arbitration facilities made available by the American Arbitration Association, The American, Boston, Cincinnati, Midwest, New York, Pacific and Philadelphia Stock Exchanges, the Chicago Board Options Exchange, and the National Association of Securities Dealers." The comments received by the Commission were to be placed in file No. S7-639.

On November 15, 1977, the Commission requested comments on a proposed dispute resolution mechanism prepared by the SEC's Office of Consumer Affairs. The Office of Consumer Affairs recommended a three part integrated nationwide system for complaint processing and resolution of investor disputes after concluding that "existing mechanisms for resolving such controversies viz. litigation and industry sponsored arbitration could be more responsive to the needs for investors."[628] The first stage of the mechanism recommended by the Office of Consumer Affairs consists of requiring brokerage firms to establish a system for the receipt, processing and disposition of investor complaints. The firms would be required to keep records of this system and periodically report on the system to the Commission and the SROs. The second stage would consist of the creation of a uniform mediation/arbitration program. This program would be administered by an independent organization which would attempt to mediate all disputes and

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624. 15 U.S.C. 78a.

625. See, Wilco v. Swann, 346 U.S. 427 (1953).

626. Securities Exchange Act Release No. 19813, May 26, 1983.

627. Securities Exchange Release No. 12528.

628. Securities Exchange Release No. 12974.

provide arbitrators for disputes where mediation is unsuccessful. This stage would include a streamlined arbitration process for resolution of disputes of less than $5,000. The third stage concerns claims of less than $1,000. These claims would be decided by a network of small claims adjusters on the basis of written submissions.

On April 26, 1977 in Securities Exchange Act Release No. 13470 the Commission deferred direct action on the development of arbitration procedures in response to the securities industry's self-regulatory organizations' decision to establish a conference to consider the implementation of a nationwide investor dispute resolution system. The Commission states "Although the Commission does have extensive authority over the self-regulatory organizations, their rules and procedures, it is of the view that it would not be useful at this time to interpose itself in this area since the industry has manifested its intention to take affirmative action." The SRO's organized the Securities Industry Conference on Arbitration (SICA) which drafted a Uniform Code of Arbitration which has been adopted by all ten of its self-regulatory members and approved by the Commission.

The simplified procedures established by SICA may be applied in any dispute between an investor and a broker-dealer in which the claim involves an amount of $2,500 or less. A person with a claim commences this process by filing a claim letter, a submission agreement (an agreement to submit to arbitration and to abide by its decision), and a $15 deposit with the Director of Arbitration of an SRO. The Director of Arbitration notifies the respondent of the claim and allows the party twenty days in which to file an answer and/or counterclaim. The Director also selects an arbitrator to hear the dispute from a roster maintained by the sponsoring SRO. The arbitrator may request that two additional arbitrators be empaneled to hear any dispute. The parties will be notified of the name(s) and affiliations of the arbitrator(s). Each party may request that an arbitrator be disqualified if the party has cause to believe the arbitrator cannot make a fair and impartial award.

Once selected, the arbitrator will make a decision and grant an award on the basis of the written submissions of the parties unless the investor requests or consents to an oral hearing. The arbitrator may require the parties to submit additional documentary evidence. The arbitrator's decision need not detail the reasons for an award and this decision is final.

This example illustrates the relationship between the SEC and the self-regulatory organizations. The SEC proposed the establishment of uniform arbitration procedures for the administration of small claims, but deferred governmental action when the SROs undertook to institute a program themselves.

Federal Trade Commission

The Federal Trade Commission encourages the development of informal dispute settlement procedures to resolve disputes concerning written warranties as well as disputes concerning matters within the Commission's jurisdiction under Section 5 of the Federal Trade Commission Act. The use of informal dispute settlement procedures to resolve warranty disputes is encouraged in the Magnuson-Moss Warranty Act[629] The FTC also encourages the use of informal dispute settlement procedures through the use of consent orders under Section 5 of the FTC Act. The most significant effort in this area involves the consent order approved in the case.[630]

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[629] 15 U.S.C. 88 2301-2310.

Informal Dispute Settlement Under the Magnuson-Moss Warranty Act. The Magnuson-Moss Warranty authorizes the establishment of informal dispute settlement procedures by one or more warrantors to resolve disputes concerning written warranties. The Act states, "Congress hereby declares it to be its policy to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms."[631] The Act directs the Federal Trade Commission to issue rules prescribing the minimum requirements for an informal dispute resolution mechanism. These rules appear at 15 CFR Section 703. A warrantor who complies with the Act and the rule promulgated under it may make resort to the mechanism a condition precedent to a civil suit under the Act. The Commission is authorized to review these mechanisms. The Conference Report makes clear, however, that this authority is not intended to preclude the courts from "reviewing the fairness and compliance with FTC rules of such procedures."[632]

The Federal Trade Commission issued its Informal Dispute Settlement Procedure Rule on December 31, 1975.[633] The Commission noted, "the intent of the Act is to provide for a fair and expeditious settlement of consumer warranty disputes, through informal mechanisms established voluntarily by warrantors."[634] The rule seeks to "avoid creating artificial or unnecessary procedural burdens so long as the basic goals of speed, fairness and independent participation are met."[635]

Under the rule, a warrantor must inform a consumer of the existence of the mechanism on the face of the warranty. This notice must include the name and address or toll-free telephone number of the mechanism. The notice must inform the consumer that the mechanism is a prerequisite to a suit under the Magnuson-Moss Act but is not a prerequisite to any other legal remedy.

The warrantor must provide a consumer with either a form to file with the mechanism or a toll-free telephone number to call in the event a dispute arises.[636] The warrantor must also provide the consumer with a description of the mechanism procedures.[637] A warrantor is free to maintain its own wholly internal complaint resolution procedures in addition to establishing a mechanism under Magnuson-Moss so long as consumers are not required to seek redress from this internal process.

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[630] In the Matter of General Motors Corporation, Docket No. 9145 (1983).

[631] 15 U.S.C. § 2310(a)(1).

[632] Consumer Products Warranty and FTC Improvements Act: Conference Report to accompany S.356, December 18, 1974, p. 26.

[633] 40 Fed. Reg. 60190 (1975).

[634] 40 Fed. Reg. 60193.

[635] 40 Fed. Reg. 60193.

[636] 16 CFR 703.2(c)(1).

[637] 16 CFR 703.2(c)(3).

The cost of the mechanism is to be borne by the warrantor. The Commission's rule prohibits warrantors from charging consumers a fee for use of the mechanism.[638] This prohibition satisfies the concerns raised in the House Committee Report which states, "informal dispute settlement procedures must also prohibit saddling the consumer with any costs which would discourage use of the procedures."[639] The Commission's prohibition on charging a fee for use of the mechanism has been criticized as encouraging frivolous complaints.[640] The Commission adopted this position, however, because, 1) the warrantor may compel a consumer to use the mechanism prior to suing under the Act, and 2) the decision of the mechanism is non-binding.[641]

A mechanism established under the Act must function independent of the warrantor's control.[642] The rule requires that a mechanism be "sufficiently insulated" from a warrantor's control or influence but does not prescribe the structure of the mechanism. The majority of the decisionmakers in a given dispute must be persons "having no direct involvement in the manufacture, distribution, sale or service of any product."[643] The rule also includes the general obligation that "members [of the mechanism] shall be persons interested in the fair and expeditious settlement of consumer disputes."[644]

The minimum operating procedures for a dispute settlement mechanism are set forth in 16 CFR 703.5. The mechanism must first notify both parties upon its receipt of a complaint. The mechanism is further directed to "investigate, gather, and organize all information necessary for a fair and expeditious decision."[645] In the event that information obtained from the parties is contradictory, the mechanism must offer each party the opportunity to submit a written rebuttal or explanation. The mechanism may allow oral presentations only in disputes where both the warrantor and the consumer consent. The rule does not require the mechanism to offer this option nor does it prescribe the form of oral presentation which may be offered.

The mechanism must issue a decision within 40 days of receiving a complaint. This time limit may be extended if the delay is attributable to the consumer. The mechanism decision is non-binding. Upon making its decision, the mechanism must determine the extent to which the warrantor will abide by its terms and inform the consumer of this fact. The mechanism must also monitor the performance of the parties and keep statistics of the number of disputes resolved and the degree of warrantor compliance.

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[638] 16 CFR 703.3(a).

[639] House, Committee on Interstate and Foreign Commerce, Consumer Product Warranties and FTC Improvements Act, Report to accompany HR 7917, June 13, 1974, p. 40.

[640] 40 Fed. Reg. 60204.

[641] Id.

[642] 16 CFR 703.3(b).

[643] 16 CFR 703.4(b).

[644] 16 CFR 703.4(c).

[645] 16 CFR 703.5(c).

The informal dispute settlement mechanism authorized by Magnuson-Moss is a voluntary procedure. A warrantor who establishes a mechanism may, however, make resort to it a prerequisite to a lawsuit under Magnuson-Moss. Although the mechanism decision is non-binding, it is admissible in court.[646]

Informal Dispute Settlement Under Section 5 of the FTC Act. The FTC has begun to encourage the establishment of informal dispute settlement procedures under its authority granted in Section 5 of the Federal Trade Commission Act to prevent businesses from pursuing unfair or deceptive trade practices. A principal example of this effort is a recent agreement reached between the FTC and General Motors (GM). In 1983 the Commission approved a proposed consent agreement with General Motors Corp. (GM) settling In the Matter of General Motors Corporation.[647] The complaint filed by the FTC in August, 1980 alleged that GM violated Section 5 of the FTC Act by failing to notify customers of serious problems or defects in its products. The complaint defines serious problems or defects as "the occurrence or likely occurrence of an abnormal number of failures or malfunctions of a component, or group of components or systems where such failures or malfunctions are costly to correct or may substantially affect the quality, reliability, durability or performance of a motor vehicle."[648] The complaint lists three components as illustrative of the existence of defects in GM motor vehicles. Specifically, the complaint alleged defects existed in 1) the THM 200 transmission, used in five to six million automobiles since 1976, 2) the camshaft used in fifteen million 305 and 350 cubic inch V-8 engines since 1974, and 3) the fuel injection pumps and fuel injectors used in half a million diesel engines since 1977. The complaint alleges GM knew or should have known of the existence of problems or defects in its products and failed to notify consumers of these facts. The failure to disclose the existence of serious problems or defects is alleged to constitute an unfair or deceptive act or practice in or affecting commerce in violation of Section 5 of the FTC Act.

Under Section 5 of the Act after the Commission issues a complaint a hearing is held to allow the party to show why the Commission should not issue an order compelling the party to cease and desist from the violation charged. The Commission's decision is reviewable by the U.S. Court of Appeals; findings of fact, however, if supported by evidence are conclusive. After the practice has been determined to be unfair or deceptive and a cease and desist order has become final, the Commission may seek consumer redress under Section 19 of the Act. Under this Section the Commission may commence a civil action against a party subject to a cease and desist order and obtain consumer relief if a court is persuaded that the act or practice involved is one which a reasonable man would have known under the circumstances was dishonest or fraudulent. In such a situation a court may grant relief as it finds necessary to redress injury to consumers resulting from the deceptive act or practice. Section 19(b) states, "such relief may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification" of the deceptive act or practice. In the case of the General Motors agreement, the Commission chose to forego this litigation option in favor of the settlement agreement.

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[646] 15 U.S.C § 2310(a)(3), 16 CFR 7035(j).

[647] Docket No. 9145.

[648] Complaint, p. 1.

Under the consent order signed by the Commission, GM agreed to establish a nationwide arbitration program to settle customer complaints concerning GM powertrain components, including transmissions, camshafts and fuel injection systems. This arbitration program expands upon an existing arbitration program, the Council of Better Business Bureau's National Mediation/Arbitration program in which GM has participated since 1981. The program established under the consent order modifies BBB's existing arbitration program in several fundamental respects. Under BBB's existing program, upon receiving a consumer complaint the BBB staff contacts the business involved in the dispute and attempts to resolve the dispute through mediation between the consumer and the business. If mediation fails, the parties may agree to enter into binding arbitration. The consumer pays no fee for participation in the program. The mediation/arbitration steps remain the same under the FTC consent order except that under the consent order the arbitration result is binding only upon GM; the consumer remains free to reject this result and seek compensation in court.

Arbitrators are drawn from the rolls of BBB's trained volunteer arbitrators. The consumer and GM each receive a list of 5 potential arbitrators whom they must rank in order of preference. BBB then appoints the individual with the highest mutual rating as arbitrator. Under the consent agreement GM must strike from consideration any arbitrator who has heard three or more disputes involving the components specified in the order. This situation should not arise however as it is BBB's practice to limit its arbitrators to no more than two cases for the same division of GM. This serves to avoid unfair selection advantage.[649] Technical experts may be provided by the BBB to assist the arbitrator in making a decision. The parties, however, remain free to bring their own technical experts to testify at the arbitration.

The arbitrator is to render a decision within 10 days. The BBB states that "decisions by the arbitrators, who represent a cross section of their communities, will be based on standards of consumer expectation rather than legal or engineering standards."[650] The decisions are intended to reflect the consumers conception of fairness.

GM agreed to submit all complaints concerning powertrain components to this arbitration process. Arbitration will be offered initially in 39 cities, however BBB is prepared to administer GM cases in all of its 156 Bureaus.[651] This program is open to all individuals with complaints concerning GM powertrain components, regardless of whether the consumer still owns the automobile.

GM agreed to notify by direct mail all those who have complained either to the FTC, a state agency or GM about a specified component of the existence of the arbitration program. GM also agreed to publicize the arbitration program in full page advertisements in national magazines to appear initially twice and later three times each year. GM will also maintain a toll-free telephone number to provide information concerning this program. The consent agreement binds GM for a period of eight years.

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[649] Comments of Council of Better Business Bureaus, FTC Docket No. 9145, p. 2036.

[650] Comments of Council of Better Business Bureaus, FTC Docket No. 9145, p. 2026.

[651] Letter from Dean W. Determan, BBB Mediation/Arbitration Division to Carol Crawford, FTC Bureau of Consumer Protection, June 17, 1983, FTC Docket No. 91455, p. 1740-1.

In addition to agreeing to submit all powertrain component disputes to the BBB's arbitration process GM also agreed to make its product service publications (PSPs) available to consumers for the next eight years. PSP's are notices and articles distributed to GM dealers and employees which describe repair and maintenance procedures for GM vehicles. These documents may help consumers identify the source of problems they have experienced with GM cars. GM also agreed to prepare an index of these previously internal documents and to make the index and the documents themselves available to the public. These indexes will begin with the model year 1982. Under the consent agreement GM also agreed to publicize the availability of the PSP's in the same manner as it will publicize the existence of the arbitration process. GM is permitted to charge consumers for each PSP ordered in accord with a price scale established in the consent order. Consumers may also obtain subscriptions of all PSPs for a given model year, beginning in 1984, at a cost not to exceed a reasonable cost or the cost charged to GM dealers.

The Federal Trade Commission and GM also developed "Background Statements" or fact sheets which consumers may submit to an arbitrator. A separate background statement was prepared to address the THM 200 transmissions, camshafts and lifters, and diesel fuel injection systems. The purpose of these statements is to provide arbitrators with a general background of the dispute involving these specific powertrain components.

This consent agreement has been described as the best alternative available by which the Commission may obtain redress for consumers who purchased GM cars with powertrain defects. The Commission's rejection of GM's offer to establish this arbitration program would have left GM car owners awaiting resolution of the FTC's complaint against GM through litigation -- a process estimated to take up to ten additional years. As FTC Commissioner Patricia P. Bailey comments, "the settlement offers the commission the fastest and indeed the only feasible way to redress the injuries suffered by many GM owners. Our sole alternative is continued litigation which would take until at least the end of the decade to resolve."[652] Commissioner George W. Douglas agrees with Commissioner Bailey noting "while the settlement is not perfect -- as is true of any negotiated agreement -- it nevertheless provides an immediacy of relief and a far higher degree of certainty for a much wider range of injured consumers than the Commission could expect to secure through litigation."[653] The GM consent agreement was criticized by FTC Commissioner Michael Pertschuk. He argued that despite the attractiveness of several of the features of this program, arbitration which resolves consumer disputes on an individual case-by-case basis is inappropriate in a situation where "there is proof of systematic defects common to an entire class of similarly situated consumers."[654] Commissioner Pertschuk contends "the only rational and equitable remedy for the common injury suffered

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652. Statement issued April 26, 1983.

653. Statement issued November 16, 1983, FTC Docket No. 9145, p. 2722.

654. Statement issued, April 26, 1983.

in a case like this is automatic compensation for damages, not standardless mini-trials pitting individual consumers against the largest company in the world."[655] He would have preferred the Commission settle the case by obtaining direct automatic refunds for consumers as had been obtained in several cases in the past. Commissioner Pertschuk notes however that GM refused to agree to any direct redress program in settlement negotiations.

The majority of FTC Commissioners believes GM's establishment of a private dispute resolution mechanism designed to speedily resolve disputes, coupled with the increased disclosure of information contained in GM's PSPs and the availability of FTC/GM background statements afforded the Commission the best opportunity for providing GM car owners with a viable remedy for injuries suffered as a result of purchasing defective GM cars. The Commission preferred this consent agreement to the alternative of pursuing resolution of the dispute through protracted litigation.

During the 60 day public comment period which followed the Federal Register's publication of the consent agreement the Commission received comments from consumers, consumer advocates, GM, the Council of Better Business Bureaus, state attorneys general and other interested parties. GM defends the consent order as a reasonable negotiated compromise to a suit the FTC had little chance of winning. Initially GM notes the long delays and difficult course the Commission would have to pursue in order to obtain consumer redress through litigation. The Commission would have to win in an administrative proceeding under Section 5 of the FTC Act, succeed through appeal, then file suit in a U.S. District Court under Section 19 for consumer redress and succeed through that appeal. GM contends that the FTC's Section 5 case is grounded in a novel ill-defined legal theory. The FTC alleged GM committed an unfair or deceptive trade practice in violation of Section 5 by failing to disclose to consumers the existence of abnormally high rates of failure in certain of its products. GM comments "exhaustive legal research of this theory corroborates that neither the Commission nor any court has ever announced a duty to disclose abnormal failure rates."[656] GM contends that even if this theory were accepted by the Commission and the courts it has a strong factual defense with which to prove that its products performed satisfactorily.

GM argues that an FTC effort under Section 19 of the Act, which is necessary to obtain consumer redress, has less chance for success than a case under Section 5. GM points out that in order to succeed under Section 19 the Commission must prove to a court that GM's failure to disclose failure rates constitutes conduct which "a reasonable man would have known under the circumstances was dishonest or fraudulent." GM concludes that such a judgment would be difficult to obtain where the Commission relies upon a legal theory being applied for the first time which consists of vague terms such as the failure to disclose the existence of abnormal failure rates. Finally, GM explains its motivation for settling the case as resulting from a desire to resolve a lawsuit which has generated a great deal of adverse publicity.

The attorneys general of 29 states filed a joint comment concerning the FTC/GM consent agreement. The attorneys general focused on several aspects of this agreement rather than upon the relative merits of settlement versus litiga-

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655. Statement issued November 16, 1983, FTC Docket No. 9145, p. 2716.

656. FTC Docket No. 9145, p. 2198.

tion. Their comments criticize the notification procedures provided in the agreement, the mediation stage required in the BBB program, and the use of arbitration to resolve these disputes.

The agreement requires GM to notify individuals who have registered complaints with either the FTC, a state agency or GM of the existence of the arbitration program. The attorneys general contend that notice should be sent to all owners of record. They criticize the order's national advertisement requirement as lacking specificity. GM may comply with this requirement by explaining and promoting the arbitration process without mentioning the allegations of the FTC complaint or the specific products named in the complaint.

The attorneys general also criticize the BBB requirement for mediation prior to arbitration. They view this step as excessive. The comment states "most owners who have complained about defects have already failed to resolve their disputes by dealing with GM's zone managers. To require them to repeat this once-failed process may strike some consumers as a frustrating waste of time. Consequently, they may well decide pursuing remedies is not worth the trouble."[657] The attorneys general also criticize the current rate at which BBB resolves disputes through mediation (ninety percent). They felt that such a high percentage of dispute resolution through mediation, in the absence of set parameters for relief, indicates that personal factors such as a consumer's sophistication or perseverance rather than the merits of a case determine whether a consumer receives redress.

Finally the attorneys general criticize the use of arbitration to resolve a large number of suits alleging common or systemic defects. They argue that the background or fact statements prepared by GM with the FTC fail to provide enough information to insure any uniformity in the resolution of disputes.

The Council of Better Business Bureaus' comments to the consent order report the results of a study concerning 180 completed arbitration cases concerning GM components specified in the order. One-half of these cases concerned the THM 200 transmission, one-half concerned camshafts and one case involved a diesel fuel injection failure. These arbitrations account for approximately 11% of all complaints filed with BBB concerning these components. The remaining 89% of these complaints were resolved through mediation. The BBB has no data on the result of the mediations. Data on mediations will be kept under the terms of the consent order. In arbitrated cases consumers received awards in 54% of the cases. BBB reports that 43% of these awards were for the full amount of the repair bill. The average award to the consumer in a transmission case was $348 and in a camshaft case $363. Reasons cited by arbitrators for not finding in favor of the consumer include the car being too far out of warranty (39 cases), poor maintenance (31 cases), and the lack of proof of repairs or maintenance (24 cases).[658]

The Center for Auto Safety also filed comments with the FTC concerning the consent order. The Center criticized the use of arbitration to resolve these disputes, the background statements prepared by GM and the FTC, BBB's capacity to handle the number of complaints which may be filed, and the dates from which

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657. FTC Docket No. 9145, p. 1893.

658. All statistics taken from comments submitted by Council of Better Business Bureaus, FTC Docket No. 9145, p. 2039-40.

GM's product service publications will be made available. The Center also noted a further drawback to the agreement. According to the Center for Auto Safety, GM has entered into negotiations with several GM consumer groups, particularly owners of GM diesel motor vehicles. The Center reports for example that a consumer group, Dieselgate, negotiated a claims procedure with GM which has handled over 2,000 claims and resulted in payments to consumers averaging more than $1,000. The Center reports at least two other groups, Lemon on Wheels (NY), and DOGMAD (CA), have also processed hundreds of claims each. The Center predicts that the consent order will crowd out these successful private efforts as GM will direct all claims to the BBB program.

Despite the variety of criticisms levelled at the consent agreement the Commission approved it on November 16, 1983. The Commission's responses to those who filed public comments stress the substantial and immediate benefits the agreement provides. It cautions critics to weigh the imperfections of the redress mechanism established by the consent order against the prospect of litigating the case an additional seven to ten years.

BACKGROUND REPORT FOR RECOMMENDATION 86-4

THE SPLIT-ENFORCEMENT MODEL: SOME CONCLUSIONS FROM THE OSHA AND MSHA EXPERIENCES

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Report to the Administrative Conference of the United States

August 30, 1986

I. INTRODUCTION

When the Occupational Safety and Health Act[1] (OSHAct) was enacted, it adopted a relatively novel and seldom-used feature in federal administrative practice-- the split-enforcement model for agency adjudications. In this model, a major area of regulatory activity is divided between two wholly separate, independent agencies. This model contrasts with the more frequently encountered arrangement in which all administrative or regulatory functions-- rulemaking, enforcement, and adjudication--are housed within a single agency. In the case of the OSHAct, one agency in the Department of Labor, the Occupational Safety and Health Administration (OSHA), has the responsibility for setting and enforcing health and safety standards. Challenges to those standards are adjudicated by the independent, three-member Occupational Safety and Health Review Commission (OSHRC).[2]

A similar division of responsibilities exists in the area of mine safety and health. The Federal Mine Safety and Health Amendments Act of 1977[3] (MSHAct) assigns to the Mine Safety and Health Administration (MSHA), also within the Department of Labor, the task of developing and promulgating mandatory safety and health standards for the nation's mining industry. Challenges to those standards are adjudicated by the independent Federal Mine Safety and Health Review Commission (MSHRC), composed of five members.[4]

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[1] 29 U.S.C. §§651-678 (1982).

[2] The Occupational Safety and Health Review Commission would refer to this administrative model as the "split-function" model. They point out that enforcement is not split between the Department of Labor and the Review Commission. Indeed they are correct: all the elements of enforcement-- investigation, citation, and prosecution-- are vested in the Department of Labor; only adjudicatory authority is lodged in the review commission. Nonetheless, for the purposes of this discussion, we shall often refer to the arrangement as the "split-enforcement" model. That formulation, however, is intended to suggest nothing different from what the review commission would mean by "split-function model."

[3] 30 U.S.C. §§801-962 (1982).

Why, in these areas, has there been such a departure from the traditional, cohesive administrative schemes that prevail in other regulatory areas? Why has there been the perceived need so completely to separate the rulemaking and adjudicatory functions from each other? How has this arrangement worked? Are there modifications that might be made to improve the regulatory processes in these areas? Should this bifurcated model be followed in other administrative areas? In the area of occupational safety and health, the success of the split-enforcement model has been mixed, at best. Better results seem to have been achieved in the mine-safety area. How can these differences be explained?[5]

The purpose of this report then is two-fold: first, to examine just how the split-enforcement model has worked--particularly in the areas of occupational safety and health and mine safety and health; and second, to suggest how the scheme may be improved in these areas and in others where its use may be contemplated.

Section II of the report reviews the statutes and the legislative histories of these two programs. Section III examines some of the problems and early conflicts in the OSHA program, with particular emphasis on the "deference" conflicts between the Department of Labor, in which OSHA is housed, and the independent Occupational Safety and Health

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[4] Previously this "split-enforcement" arrangement has been used in federal income tax dispute cases. The Board of Tax Appeals, the predecessor to the United States Tax Court, was empowered to hear disputes from the Internal Revenue Service. See 26 U.S.C. §7441.

The current system for enforcing certain provisions of the Federal Aviation Act divides responsibilities between the Federal Aviation Administration and the National Transportation Safety Board. See 49, App. U.S.C. §1903(a)(9).

[5] Some recent Congressional proposals to create a separate and independent Social Security Review Commission to adjudicate appeals from the denial of social security or disability benefits have been advanced. During the 98th Congress, two bills to create an independent Social Security Review Commission, H.R. 3541 and S. 1911, were introduced. Neither bill was enacted. Earlier proposals to adopt a split-enforcement arrangement were also considered in connection with the Fair Housing Amendments Act of 1979. Congress, however, eventually settled for the traditional unitary model in that legislation.

Review Commission. Section IV looks at the same questions in the context of MSHA-MSHRC. Section V evaluates one of the frequent justifications cited for adopting this model-- the enhanced prospects for due process. Section VI attempts to draw some conclusions and proposes some recommendations regarding future uses of the split-enforcement concept.

II. THE LEGISLATIVE HISTORY

A. Occupational Safety and Health

The OSHAct requires every covered employer to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."[6] Congress gave the Secretary of Labor broad authority both to adopt any existing safety standard and, by rule, to "promulgate, modify, or revoke any occupational safety or health standard...."[7]

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[6] 29 U.S.C. §654(a)(1) (1982).

[7] See generally, 29 U.S.C. §§654- 661 (1982). The OSHAct also authorizes the Secretary to conduct inspections and investigations of employment sites. If the Secretary concludes "that an employer has violated a requirement. . . standard, rule. . . order. . . or regulation (of OSHAct)," he issues a citation to the employer, who, within fifteen working days, must notify the Secretary whether the employer intends to contest the citation. If the employer fails to contest the citation within the fifteen-day period, the citation and any penalty assessed under it become final, and neither is subject to review by any court or by any other agency. If, on the other hand, the employer notifies the Secretary that the employer intends to contest the citation, "the Secretary shall immediately advise the Commission (OSHRC) of such notification, and the Commission shall afford an opportunity for a hearing . . . (and) thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief, and such order shall become final thirty days after its issuance."

The hearing, initially before an administrative law judge (ALJ), is conducted in accordance with section 554 of the Administrative Procedure Act, but without regard to section 554(a)(3). The report of the administrative law judge becomes the final report of the Commission within thirty days after the judge's report, unless within that period a Commission member has directed that the ALJ's report be reviewed by the Commission.

The adoption of the occupational health and safety statute stirred intense controversy and disagreement from the very beginning. Even though there was considerable unanimity of opinion that American workers needed federal legislative protection in their workplaces, there was little agreement about how those federal standards would be promulgated and enforced. A principal focus of the legislative debate concerned the arrangement of the rulemaking, enforcement, and adjudicatory functions of the agency that would be responsible for this new program. Who would make the rules, and how extensive would be his authority to interpret those rules and to penalize violators of them?

One of the original bills[8] introduced in Congress would have followed the traditional administrative model and reposed all three functions-- rulemaking, enforcement, and adjudication-- in the Department of Labor. That bill enjoyed enthusiastic support from Democrats and from organized labor, which apparently felt that it could expect more vigorous and stringent protection from its traditional government ally. Another bill,[9] more strongly endorsed by business interests, would have divided the three administrative functions among three separate agencies-- one to promulgate the regulations, a second agency within the Department of Labor to enforce them, and a third independent agency to adjudicate challenges to them. As it finally emerged from Congress, the OSHAct[10] embodies a compromise, engineered in the main by then-Senator Jacob Javits of New York. Both the Javits compromise and the more far-reaching bill that called for the

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Judicial review may be obtained in any United States court of appeals for the circuit in which the violation is said to have occurred or in which the employer has its principal office. Either the Secretary of Labor or any person who claims to be adversely affected or aggrieved by the Commission's order may petition for a review of the Commission's decision. Section 660 (a) also provides the District of Columbia Circuit as an additional forum, available to "any person adversely affected or aggrieved by an order of the Commission issued under subsection (c) of section 659...."

[8] H.R. 843, 90th Cong., 2d Sess. (1967).

[9] H.R. 13373, 91st Cong., 1st Sess. (1969); S. 2788, 91st Cong., 1st Sess. (1969).

[10] OSHAct, Pub. L. No. 91-596, 84 Stat. 1590 (1970).

complete three-way division of responsibilities were concerned that so concentrated a grant of power to the Secretary and the Department of Labor, as envisioned by the Democrats' original bill, would create an appearance of unfairness and, therefore, compromise the prospects for due process in adjudicatory challenges to the Department's standards. In a statement of his individual views accompanying an early version of the act,[11] Senator Javits remarked that:

> ...[H]earing and determination of enforcement cases by an independent panel more closely accords with traditional notions of due process than would hearing and determination by the Secretary. In the latter case the Secretary is essentially acting as prosecutor and judge. Any finding by the Secretary in favor of a respondent would essentially be a repudiation of his own Department's employees. While this type of enforcement has been used in connection with other statutes, is contemplated by the Administrative Procedures (sic) Act, and is not jurisdictionally defective on due process grounds, the awkward mechanics it imposes on heads of Departments who wish to exercise their adjudicatory power personally in order to preserve due process has not been appreciated. What happens is that one official of the Department (e.g., the Deputy Solicitor) will take the position of prosecutor and another official (e.g., the Solicitor) will take the position of a neutral in order to advise the Secretary.
>
> More important, because of the awkwardness of this procedure and the heavy burden of personally reviewing hundreds of enforcement cases, it is highly likely that the Secretary of Labor will not even exercise his power under the Committee bill personally, but will delegate it to a panel of officials within the Department.... The net result will be enforcement by a panel anyway, but not one which is independent....[12]

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[11] S. Rep. No. 1282, 91st Cong., 2d Sess., reprinted in 1970 U.S. CODE CONG. & AD. NEWS 5177, 5218. See also, LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY 7 HEALTH ACT OF 1970, 195 (1970).

[12] Id. The Javits amendment also reflected a concern for speed of enforcement. The amendment allowed for immediate, self-enforcing orders at the conclusion of the administrative proceeding. The original Senate bill provided that no enforceable order to correct a violation would issue until both the administrative proceeding and any availed-of judicial proceedings had ended. Javits believed that his

Even though Javits recognized that the unitary model existed in other statutes and was "not jurisdictionally defective on due process grounds," he pressed for and prevailed in dividing the responsibilities between the Secretary of Labor and the independent review commission. It was Javits's view, and the view of several others in Congress, that "the independent Panel approach would... preserve due process more easily, and thereby instill much more confidence in the whole program in workers and businessmen alike."[13]

B. Mine Safety and Health

The MSHAct repealed the Federal Metal and Nonmetallic Mine Act[14] and substantially amended the Federal Coal Mine Health and Safety Act.[15] The result placed coverage of the entire mining industry, metal and non-metal, under one act; transferred enforcement responsibility from the Secretary of Interior to the Secretary of Labor; streamlined the procedures for promulgating and enforcing health and safety standards; and created an independent review commission to resolve contested citations.[16]

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compromise would save between six months and two years in most contested cases.

[13] See, LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY & HEALTH ACT, supra note 37.

[14] 30 U.S.C. §721 (repealed 1977).

[15] 30 U.S.C. §§801-962 (1982).

[16] See generally, 30 U.S.C. §§813-823 (1982). The MSHAct empowers the Secretary to promulgate mandatory health and safety standards and includes detailed provisions for the inspections of mines. The MSHAct requires the Secretary to conduct frequent mine inspections to determine, among other things, whether the mine operators have complied with the mandatory health or safety standards and other provisions of the act. When an inspector concludes that a mine operator

In many ways the mine-safety statute resembles the occupational safety and health statute. Both statutes divide rulemaking and adjudicatory authority between the Labor Department and an independent review commission. Yet there are important differences between the two statutes and the programs they create.

The most obvious difference-- and perhaps the most crucial-- between the two statutes is in the breadth of their coverage. The OSHAct potentially covers every conceivable kind of industrial and occupational category, almost every conceivable employment situation, almost every employer-- from General Motors to the neighborhood greengrocer. The extent of the act's coverage is itself daunting to contemplate. By its terms, the OSHAct applies to "every person engaged in a business affecting commerce who has employees." Only the United States government, the states of the United States, and their political subdivisions are excluded from its coverage.[17] It would appear to be an almost impossible task for OSHA to know with any accuracy just how many "persons" are, at any particular time, subject to its jurisdiction. Furthermore, except for the statutory

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has violated the act or one of the standards issued pursuant to it, "he shall with reasonable promptness, issue a citation to the operator," which must specify "a reasonable time for the abatement of the violation." An operator's failure to abate the citation may result in an order, requiring all persons to be withdrawn from the area of the mine affected by the citation, until the Secretary of Labor determines that the violation has been abated. For each citation, the Secretary may propose a civil penalty, which may not exceed ten thousand dollars for each violation.

The MSHAct also permits operators to contest citations and proposed penalties within thirty days of their issuance. If, within the thirty-day period, the operator does not notify the Secretary that the operator intends to contest the citation, both the citation and the proposed penalty become "a final order of the Commission. . . not subject to review by a court or agency." If the operator files a timely contest, the case is heard by an administrative law judge of the review commission. Any person adversely affected or aggrieved by a decision of an ALJ may file, within thirty days after the issuance of that a decision, a petition for discretionary review by the Commission. If not satisfied with the Commission's decision, such person, within thirty days of the issuance of the decision, may obtain judicial review in an appropriate court of appeals.

[17] 29 U.S.C. §652(a).

charge requiring "every employer to furnish each of his employees employment and a place of employment which are free from recognized hazards,"[18] there is little identity of interests or commonality to unite those subject to OSHA's regulatory jurisdiction.

The MSHAct, on the other hand, applies to a discrete and insular employment sector, whose membership, although varied in size and geographic location, is more similar and homogeneous with respect to the industrial activities and the occupational hazards to which they are exposed. According to one MSHA official, at almost any given moment, it is possible for MSHA to determine with substantial accuracy the number of persons and mines subject to its jurisdiction.[19] MSHA regulates only one industry. OSHA, by comparison, regulates virtually everything else.[20]

In another contrast, the mine-safety legislative history, however, discloses no spirited debates or disagreements regarding use of this bifurcated administrative arrangement. On the contrary, the Committee report accompanying the bill that became law states rather matter-of-factly that:

> [t]he Committee realizes that alternatives to the establishment of a new independent reviewing body exist.... The Committee also recognizes that there are organizational and administrative justifications for avoiding the establishment of new administrative agencies. However, the Committee believes that the considerations favoring a completely independent adjudicatory authority outweigh these arguments.
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> The Committee believes that an independent Commission is essential to provide administrative

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[18] Id. at §654(a).

[19] Interview with Frank O'Gorman, Federal Mine Safety and Health Administration, Arlington, Virginia (February 3, 1986).

[20] There is at least one other difference. Unlike OSHRC, MSHRC is composed of five members who are empowered to act in panels. One commentator has called for enlarging OSHRC from its current three to five members. See Rothstein, infra note _____.

> adjudication which preserves due process and instills much more confidence in the program.[21]

Again, preserving due process and eliciting more confidence in the program are asserted as reasons for this novel administrative arrangement. Is some fundamental change at work here?

The idea of separation of functions is not a novel concept in administrative law.[22] It is almost axiomatic that some functions should be separate from others, that the prosecutor should be distinct from the investigator and from him who would decide disputed questions of fact.[23] That is basic to the American idea of due process. Yet, in administrative law, due process has never been held to require that those functions be as separate, as independent as they are in the OSHA-OSHRC and the FMSHA-FMSHRC schemes.[24]

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[21] Senate Committee on Human Resources, FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, S. Rep. No. 181, 95th Cong., 1st Sess. (1977), reprinted in 1977 U.S. CODE CONG. & AD. NEWS 3401, 3446-7.

[22] The Administrative Procedure Act provides for a system of internal separation of functions in agencies that exercise both rulemaking and adjudicatory authorities. The main provisions are in section 554(d) of the APA. The provision is applicable only to cases "of adjudication required by statute to be determined on the record after opportunity for an agency hearing" with certain exceptions laid down at section 554(a) and section 554(d).

[23] According to Professor Kenneth Davis, "What the Administrative Procedure Act calls 'separation of functions' is designed to prevent contamination of judging by the performance of inconsistent functions, including primarily prosecuting and investigating, and secondarily instituting proceedings, negotiating settlements, and testifying. Many agencies, either through agency heads or their staffs or both, perform all these various functions. The problem is to separate inconsistent functions in such a way as to protect the judging function." See generally, Kenneth Culp Davis, ADMINISTRATIVE LAW TEXT (3rd Edition), Chapter 13.

[24] The case law generally rejects the notion that the combining of judging with prosecution or investigation is ipso facto a denial of due process. See, e.g. MARCELLO v. BONDS, 349 U. S. 302 (1955).

In fact, one of the advantages traditionally associated with the American administrative agency is its unique combination of rulemaking, enforcement, and adjudicatory functions.[25] What, then, can explain these breaks with tradition?[26]

During the OSHA legislative debates, Senator Javits conceded that the traditional administrative arrangement is "not defective on due process grounds." The legislative report on the MSHAct, on the other hand, asserts that such a complete separation "is essential to provide due process and [instill] much more confidence in the program." Little else, however, is said in either legislative discussion regarding what is in some ways a really radical decision-- the decision to separate the traditional administrative functions in so unconventional a fashion.

And how would these divisions of responsibility really work? In the legislative history of the MSHAct, Congress does attempt to clarify its intentions with respect to how this division of administrative responsibilities between MSHA and MSHRC should function. At one point, the Committee report provides that, "[s]ince the Secretary of Labor is charged with responsibility for implementing this Act, it is the intention of the Committee, consistent with generally accepted precedent, that the Secretary's interpretations of the law and regulations shall be given weight by both the Commission and the courts."[27]

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[25] See, e.g., B. Schwartz, ADMINISTRATIVE LAW §1.5 (2nd Ed. 1984), citing, REPORT OF ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE (1941).

[26] No other administrative models of separation go as far as the examples provided by the OSHA-OSHRC and FMSHA-FMSHRC schemes. The National Labor Relations Board (NLRB), however, does provide an example of a different kind of separation.

The Taft-Hartley Act of 1947 provides for a General Counsel of the NLRB, who is appointed directly by the President for a four-year term. The General Counsel is completely independent of the Board. His authorities include investigating and prosecuting labor violations. He has final authority to investigate charges, issue complaints, and prosecute those complaints before the Board, which under the statute is an adjudicatory agency only. The substance--if not the form-- of the NLRB, therefore, is of two separate agencies with the independent Office of General Counsel performing the investigating and prosecuting functions and the five-member Board limited to hearing and deciding cases. See, 29 U.S.C. §153.

Even such a meager statement of Congressional intention is absent from the OSHAct. Was this "directive" included in the mine-safety statute in view of the evidence that the OSHAct agencies and the courts reviewing their decisions were often confused regarding the extent of their respective responsibilities? Can the confusion between OSHA and OSHRC be attributed to the absence of clear congressional directives to the two agencies? If so, has this statement in the MSHAct obviated similar confusion between MSHA and MSHRC? And what of the congressional champions' principal reasons for advocating such a complete separation of functions: has this administrative arrangement resulted in more fairness and due process or instilled more confidence in either regulatory program?

Is it the statutes themselves, the ways in which the agencies created under them are expected to operate, or is there something unique about these regulatory programs that may explain these departures? What conclusions may fairly be drawn from these experiences-- in the case of OSHA-OSHRC, now more than fifteen years; in the case of FMSHA-FMSHRC, almost ten?

III. INSTITUTIONAL CONFLICTS: The OSHAct

In principle the idea of separate, independent adjudication is appealing. It is so fundamental a feature of Anglo-American law. Who could quarrel with the concept? Yet the independent adjudication under the OSHAct has not met with universal acclaim. In fact, confusion regarding the precise nature of OSHRC's role was a major source of the early and persistent criticism of the OSHA program. An earlier study chronicled many of the Commission's initial problems. Among the problems cited were the Commission's tremendous caseload and its delay in deciding contested cases-- due, in large measure, to one commissioner's "protest policy", which effectively directed every case for full Commission review; and the lack of unanimity among the Commissioners, which delayed the decision process because of the frequency of separate opinions.[28]

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[27] Senate Committee on Human Resources, FEDERAL MINE SAFETY & HEALTH ACT OF 1977, S. Rep. No. 181, 95th Cong., 1st See. (1977), _reprinted in_ 1977 U.S. CODE & AD. NEWS 3401.

[28] _See_ Rothstein, _OSHA After Ten Years: A Review and Some Proposed Reforms_, 34 VANDERBILT L. REV. 71 (1981). _See also_ Sullivan, _Independent Adjudication and Occupational_

OSHA was born with a problem that really was not of its own making. Section 6(a) of the OSHAct directed the Secretary "as soon as practicable" to promulgate as a national health and safety standard "any national consensus standard, and any established federal standard."[29] These "received" standards were to be promulgated without the necessity of complying with the provisions of the APA.[30] OSHA, therefore, began its life with several regulations that it had no hand in devising. The administrative problems developed almost immediately.[31]

Some of OSHA's early problems may be attributed to its forced reception of these consensus standards, many of which had been privately adopted and which previously had functioned primarily as optional, aspirational, measures.[32]

Safety and Health Policy: A Test for Administrative Court Theory, 31 AD. L. REV. 177 (1979).

[29] 29 U.S.C. §655(a) (1982).

[30] Id.

[31] See, Rothstein, supra note _____.

[32] Professor Rothstein's text on occupational safety highlighted some of the early problems encountered because of this wholesale adoption of industry standards without public comment.

At one point he writes:

> The overwhelming majority of safety standards were adopted from already existing private standards. These standards are hardly models of clarity and precision and have been subject to considerable criticism.
>
> Because of the poor quality of many standards the Commission and courts have been forced to choose between two competing interests. On the one hand, the immediate safety of employees suggests the need for the broadest possible construction and the widest application of standards to best effectuate the remedial purpose of the Act. On the other hand, due process considerations favor a strict construction of standards so that employers will not be penalized without having received adequate prior notice of the required

Review of standards promulgated pursuant to section 6(a) would present special difficulties. What, in their origins, were mainly intended to be voluntary standards are by virtue of section 6(a) transformed into enforceable government requirements. What should be the government's attitude regarding these "standards"? Do they become enforceable as the original non-government promulgators might have intended? Or, might the government insist on a different level of compliance or compliance by companies which, although members of the target industry, may not have subscribed to the original, voluntary standards? And finally, is the government, by adopting these consensus standards, saddled with the entire "legislative history" from the industrial organizations that developed them? These are but some of the questions that appear neither to have been asked nor considered in the legislative discussions of the OSHAct.

The review commission, or at least one member of the Commission, has taken the view that, because such standards themselves did not emanate from the Secretary, the Commission should be free to re-interpret such standards whenever it disagrees with the construction or effect that the Secretary might give to them.[33] As one might expect, that view has led to several disputes between the Labor Department and the review commission. Not only should the Commission be free to make its own determination regarding the meaning of a consensus standard, but, according to this view, it should also be free to interpret the meaning of any established federal standard promulgated under 6(b).[34]

OSHA officials, of course, are not impressed with that argument. Instead they argue that OSHA was given the rulemaking authority and that its judgment regarding the meaning of the rules-- be they 6(a) or 6(b) rules-- should be

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conduct.

See, M. Rothstein, OCCUPATIONAL SAFETY AND HEALTH LAW §125 (2d Ed. 1983).

[33] Interview with E. Ross Buckley, Chairman, Occupational Safety and Health Review Commission, Washington, D.C. (August 8, 1985).

[34] Standards other than the consensus and other received industry standards, promulgated on the Secretary's own initiative are often called "6-b" standards, referring to the section of the OSHAct that empowers the Secretary to issue new safety standards. *See*, 29 U.S.C. §655.

conclusive. Furthermore, they maintain that since the vast majority of standards promulgated are still 6(a)-standards, the Commission could, under the guise of adjudicating, effectively set occupational health policy, thereby eviscerating the authority Congress sought to repose in the Secretary.[35]

Whether they be 6(a) or 6(b) standards, a major source of contention has existed over how authority under the act is intended to be distributed between OSHA and OSHRC. An examination of some of the principal disputes between these agencies confirms the struggle that periodically has raged between OSHA and the Commission. Not only that, but this examination also reveals that the federal courts have not been much more successful than have the two agencies at determining just how this allocation of responsibilities should operate.

A. A. AMORELLO AND SONS: The Problem of Deference

1. Before the Commission

One might well read the Commission's duty to "issue an order, based on findings of fact,"[36] as narrowly circumscribing the Commission's role to ascertaining whether, in fact, the cited employer has done what the Secretary forbade (or has refused to do what the Secretary has decreed). That language does not imply-- at least, it does not unavoidably imply-- that the Commission would have any role whatsoever in evaluating the wisdom, utility, or the subjective necessity for the challenged standard. Rather, the language seems more plausibly to suggest that the Commission make the more objective, neutral determination that the cited employer either did or did not violate the Labor Department's standard. Yet, neither the Commission nor many reviewing courts have been willing consistently to ascribe to the Commission that singular responsibility.

Donovan v. A. Amorello and Sons[37] is one of the more recent cases to have faced the conflict that has frequently flared between OSHA and OSHRC.

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[35] Interview with Frank White, Associate Solicitor, and Daniel Mick, Counsel for Regional Trial Litigation, Occupational Safety and Health Administration, Washington, D.C. (August 28, 1985).

[36] 29 U.S.C. §659(c) (1982).

[37] 761 F.2d 61 (1st Cir. 1985).

OSHA had charged Amorello, a Worcester, Massachusetts, contractor, with violating an OSHA regulation which states:

> No employer shall permit earthmoving...equipment which has an obstructed view to the rear to be used in reverse gear unless the equipment has in operation a reverse signal alarm distinguishable from the surrounding noise level or an employee signals that it is safe to do so.[38]

In response to a complaint regarding an unshored trench, an OSHA compliance officer and his supervisor visited an Amorello worksite in Worcester, Massachusetts. There they observed a front-end loader operating in reverse. According to the Commission decision, "(n)either the compliance officer nor his supervisor heard a backup alarm."[39] Even though, later during the inspection, the compliance officer was shown that the loader was equipped with an alarm, his report concluded that Amorello was in violation of the standard because "a backup alarm was required to be in operation while the loader was in motion because the view to the rear was obstructed."[40]

The administrative law judge who heard Amorello's contest did not decide the issue of whether the company's loader had an obstructed view. Rather, he vacated that item, because the compliance officer subsequently admitted that he had heard an alarm during the inspection. The ALJ then determined that, because of this "credibility finding," the compliance officer's testimony "was otherwise entitled to no weight."[41]

At the Commission hearing, OSHA argued that the ALJ's reasons for refusing to credit the compliance officer's testimony were unsound. Furthermore, OSHA contended that a violation was proved "because the standard requires either a reverse alarm or a signalman if the view to the rear is obstructed to any extent."[42] OSHA maintained that the operator's view to the rear was obstructed by an exhaust pipe and by the position of the loader's engine. The ALJ decided that the Secretary's citation should be vacated. By a vote of 2-1, the Commission affirmed the ALJ's decision to vacate the citation.[43]

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[38] 29 C.F.R. §1926.602(a)(9)(ii) (1984).

[39] 11 OSHRC 2040 (1984).

[40] Id.

[41] See, Brief for Petitioner (Secretary of Labor) at 5, DONOVAN v. AMORELLO AND SONS, INC., 761 F.2d 61 (1st Cir. 1985).

Even though the Commission affirmed the administrative law judge's decision to vacate the citation, it did so for reasons different from those of the ALJ. The Chairman of the Commission wrote that:

> [the] evidence establishes that the loader's operator had a clear view to the rear, unblocked by any part of the loader, except for two feet immediately behind it, where the view was limited only by the location of the loader's engine. The question therefore reduces to whether the two-foot limitation created by the engine compartment amounts to an "obstructed view to the rear" within the meaning of the standard. (emphasis added) I think not.[44]

According to the Chairman's opinion, this condition was not within the meaning of the standard because it "is not a significant obstruction created by a special part of the vehicle...that obstructs the operator's view during the entire course or a significant portion of the rearward travel."[45] In addition, the majority commissioners justified their decision on the basis that the operator's rear field of vision was limited "only during the first two feet of travel; after that, the operator's field of vision encompassed areas previously seen to be clear."[46] The Chairman's opinion concludes with the observation that "the phrase °obstructed to the rear' did not appear in the proposed version of this standard...." Because the originally proposed standard would have required backup alarms on all earthmoving equipment, the opinion found that the phrase "obstructed view to the rear" was not meant "to govern minor limitations that are common to nearly all earthmoving equipment."[47] The Commission thus concluded that, because there was no "significant" obstruction, there was no violation of the OSHA regulation.

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[42] *Id.*

[43] 11 OSHRC 2040 (1984).

[44] *Id.*

[45] *Id.*

[46] *Id.*

Commissioner Buckley, concurring in the Chairman's decision, wrote that the obstructed view existed for a distance of only two feet from the rear of the loader, that the inspectors did not see the machine operate during the first two feet of its rearward motion and, therefore, that they could not know the alarm was not working.

Commissioner Cleary, dissenting, rejected the reading of his colleagues and maintained that the citation should be affirmed. In his view, the purpose of the standard is "to ensure that employees are not in the path of earthmoving equipment."[48] As he saw it, the majority's interpretations would defeat the purpose of the standard. Furthermore, Cleary acknowledged that his colleagues had "effectively rewritten [the standard] to limit its applicability to 'significant' obstructions."[49] The result, he said, would be to except obstructions that are common to nearly all earthmoving equipment from the coverage of the standard.

Cleary could discern no reason to conclude that the addition of the phrase "obstructed to the rear" to the proposed standard would render the standard inapplicable to minor limitations. But perhaps most significantly, Cleary would have affirmed the Commission's decision, because, as he said:

> The majority interpretations also introduce a mischievous element of subjectivity into a standard that objectively sets forth the circumstances under which compliance is required. Heretofore, an employer could confine his inquiry to whether the view of the operator was obstructed within the plain meaning of the term. An employer now must also determine whether the obstruction is "significant." But there is little guidance as to when a "significant" obstruction exists.... I am unclear as to when an obstruction ceases to be a "minor limitation" and becomes "significant" and I suspect employers who apply this standard in the future will share my confusion. Under the rationale in the

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[47] *Id.*

[48] *Id.*

[49] *Id.*

> concurring opinion, instead of determining whether the entire path to the rear of equipment is in the operator's view, an operator must take "several factors" into account to decide whether the view is obstructed. Little guidance is provided as to how to apply these factors or when these factors combine to yield a conclusion that an obstructed rear view exists.[50]

Only Cleary, among the commissioners who decided Amorello, seems to have appreciated the institutional roles that had been assigned the respective agencies. Cleary's dissenting opinion recognizes, even if does not explicitly state so, that the Secretary may employ whatever subjective criteria he thinks appropriate when he promulgates a regulation. He, of course, may eschew subjective criteria altogether. That is the nature of legislative choices--subjective, preferential in many instances. When promulgating rules pursuant to his statutory charge, the legislator may call on any and all of the knowledge or information available to him.[51] The adjudicator's role, however, must be different. The adjudicator must evaluate facts, evidence to ascertain whether the party charged with a violation has followed-- or, as the case may be, refused to follow-- the legislator's decree.[52] In Amorello, the majority commissioners did not discharge their responsibilities under the act. Rather, they strayed into the field of subjectivity and sought to exercise a function that, by logic if not by law, belongs to the Secretary.

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[50] Id.

[51] See generally, B. Schwartz, ADMINISTRATIVE LAW (2d Ed. 1984) § 4.8: "Rulemaking is the administrative equivalent of the legislative process of passing a statute. Agencies engaged in rulemaking are, as a general proposition, no more subject to constitutional procedural requirements than is the legislature engaged in enacting a statute. . . . Nor is the rulemaking process bound by the principle of exclusiveness of the record. The agency may look beyond the record and rely on the kinds of investigative and other extrarecord materials used by legislative committees. It may act not only on the basis of the hearing record, but also upon the basis of information in its own files and its knowledge and expertise."

[52] Adjudicators, as distinguished from rulemakers, are generally limited to a "record" of some kind in making their decisions and judgments. The adjudicator must be guided by "all the relevant factors" and those alone; and in the context of formal proceedings, the relevant factors must appear within the four corners of the record. See, e.g.

2. In the Court of Appeals

Having failed to persuade the Commission that the Amorello citation should be affirmed, the Secretary of Labor sought review in the Court of Appeals for the First Circuit. In an opinion by Judge Breyer, the court vacated the decision of the Commission. In vacating the Commission's order, the court held that OSHA's interpretation of its regulation should be controlling so long as it is reasonable.[53] That reasonableness, according to the court, should be evaluated in light of "the agency's likely greater knowledge of the rule's intended purpose and the agency's practical understanding of how competing interpretations may affect the agency's regulatory mission."[54] In siding with the Secretary, the Amorello court based its decision on two considerations-- the legislative history and practical administrative requirements.

First, the court examined the legislative history of the OSHAct, concluding that it "suggests that OSHRC's mission is primarily factual in nature, its role is to hear charges of violations...[and] to guarantee that those charged are adjudicated fairly."[55] The court reasoned that, even though Congress did establish OSHRC as an independent review commission, it intended that the Commission's powers would be

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CITIZENS TO PRESERVE OVERTON PARK v. VOLPE, 401 U.S. 402 (1971). See also, 5 U.S.C. §§554, 556, & 557.

[53] 761 F.2d 61, 63 (1st Cir. 1985). See also, DONOVAN v. DANIEL MARR & SON, 763 F.2d 477, 483 (1st Cir. 1985) (following AMORELLO yet saying: "This does not mean that a persuasive interpretation by the Commission will give way to a marginal interpretation by the Secretary; but where, as here... the Commission's view seems, if not insupportable, at least strained, there can be little choice as to which reading we must accept."); ISAAC v. HARVARD UNIVERSITY, 769 F.2d 817 (1st Cir. 1985), BROCK v. SCHWARZ-JORDAN, INC., 777 F.2d 195 (1st Cir. 1985). PRACTICO v. PORTLAND TERMINAL CO., 783 F.2d 255, 269 (1st Cir. 1985) Campbell, dissenting.

[54] 761 F.2d at 63.

[55] Id. at 65.

very limited. Because Congress did not elect to place rulemaking authority in an agency separate from OSHA suggests that "Congress did not intend OSHRC to possess broad powers to set policy through the creation of rules-- powers that other agencies sometimes exercise in adjudicatory (as well as rulemaking proceedings)."[56]

Second, the Amorello court found that "practical administrative considerations favor looking to OSHA for a more authoritative interpretation of a regulation."[57] OSHA chose the language of the regulation; it is more likely to have "an institutional memory" of its meaning and purpose.[58] Because OSHA is both the "legislating" and "enforcing" authority, that dual responsibility "provides it with expert knowledge of the practical outcomes of different interpretations."[59] The court does not gainsay that OSHRC too has acquired some expertise from adjudicating disputes over OSHA regulations and that expertise is entitled to some weight in appropriate circumstances. "But," the court says, "that experience arises out of its having adjudicated many cases; it is likely factual in nature; and it necessarily concerns examples of rule violations (which are presumably less typical than instances of compliance)."[60]

The Amorello court, it may be said, decided the question of whose interpretation should prevail by examining the intended functions of the two agencies. The court reviews the functions of the two agencies in the context of the entire administrative apparatus that Congress has here created. In addition, it also examines what Congress asserted to have been its primary aims when it departed from the traditional administrative arrangement when this statute was adopted.

Even though Congress chose to divide the administrative responsibilities between two agencies, it nonetheless gave to OSHA the rulemaking and enforcement authority. While the concept of such divided responsibilities may have been novel, what constitutes rulemaking surely is not. Furthermore, it is almost a canon of administrative law that courts should defer to an agency's interpretation of its own regulation unless that interpretation is demonstrably irrational.[61] Moreover, it is clear that, in devising the OSHA-OSHRC administrative scheme, Congress intended merely to give to the independent review commission only one of the functions that traditionally more integrated agencies exercise. Had Congress intended an even more radical departure-- such as giving the Commission authority both to interpret regulations and to adjudicate disputes arising under them-- it would seem to demand more specificity and clarity of statement on that point than the OSHAct's legislative history reveals.

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[56] Id.

[57] Id. at 66.

[58] Id.

[59] Id.

[60] Id.

But that notion itself seems basically incompatible with the chief purpose that has frequently been cited for this administrative division. As unedifying as the legislative history here may be, one thing does seem clear: Congress did not want the framer of the rule to decide disputes arising under the rules that he had formulated. It is equally apparent that Congress did not intend that the adjudicator be able to formulate the rules on which he would then sit in judgment. What the First Circuit sought to do here is what courts should do whenever they are called upon to discover legislative purpose, legislative intent-- particularly when that purpose, that intent may not be readily discernible from the language of the statute: to give force and effect to the legislation so as not to defeat the legislature's overall aim. The judicial inquiry in such a case as this one then is simple: What was the legislature's purpose, its intent in separating these functions? The answer is almost deceptively simple as well-- to remove the resolution of adjudicatory challenges from the control of the rulemaker and, as a corollary, to remove the rulemaking responsibilities from the control of the adjudicatory authority. To permit the Commission to "rewrite" an OSHA regulation in this way and then to decide that Amorello does not violate that regulation would be to permit what Congress had legislated to prevent.

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[61] See, e.g., UDALL v. TALLMAN, 380 U.S. 1, 16-17, 85 S. Ct. 792, 13 L.Ed.2d 616 (1965).

B. Similar Judicial Responses

The position of the First Circuit has been taken by other courts. The Fifth Circuit also has maintained that, in choosing between the Secretary's interpretation of his agency's regulation and OSHRC's construction, the Secretary's interpretation, if reasonable should govern. One case, Brennan v. Southern Contractors Service[62] involved an OSHA rule, which required use of a safety net where the use of other safety devices would be impractical. After the fatal fall of one of its employees, Southern was cited for violating the regulation. A safety expert testified before the ALJ that safety belts rather than safety nets would be practical.[63] In light of that testimony, the ALJ determined that the regulation required safety nets "only if one of the other safety devices is impractical,"[64] whether it was being utilized or not. The Commission affirmed the ALJ's construction of the regulation.

The Fifth Circuit reversed the Commission, holding that the Commission's interpretation would undermine the purpose of the OSHAct-- "to protect the health and safety of workers and to improve physical working conditions on employment premises."[65] Significantly, the Court also held that "the promulgator's interpretation is controlling as long as it is one of several reasonable interpretations."[66]

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[62] 492 F.2d 498 (5th Cir. 1974). See also SCHWARZ-JORDAN, INC., 777 F.2d 195 (5th Cir. 1985) ("This court has held that the Secretary's interpretation is controlling as long as it is one of several reasonable interpretations, although it may not appear as reasonable as some others.") Id. at 197.

[63] Id. at 500.

[64] 29 C.F.R. §125.105(a) (1973).

[65] 492 F.2d at 501. But see FIEGEN, infra. See also, EVERGLADES SUGAR REFINERY v. DONOVAN. 685 F.2d 1076, 1081 (5th Cir. 1981). Cf., H.B. ZACHIRY CO. v. OSHRC, 638 F.d 812, 817 (5th Cir. 1981). But see, COCA-COLA CO. v. ATCHISON, TOPEKA AND SANTA FE RY. CO., 608 F.2d 213, 222 (5th Cir. 1979); USERY v. KENNECOTT COPPER CO., 577 F.2d 1113, 1119 (10th Cir. 1977); DIAMOND ROOFING CO. v. OSHRC, 528 F.2d 645, 649 (5th Cir. 1976).

A Tenth Circuit panel reached a similar conclusion in Brennan v. OSHRC and Kesler and Sons Construction Company.[67] That case, however, involved the construction of a statutory term rather than a regulation. Initially Kesler had been cited for noncompliance with certain OSHA-mandated safety standards. The citation ordered immediate abatement for all violations and assessed penalties on the company. Kesler did not contest the citation. The company was then later cited for failing to correct the violations. Kesler contested the notification of failure to correct and the penalty assessment. Following the required hearing, the ALJ found that the company had failed to correct the cited violations, yet he reduced the penalty. On review by the Commission, OSHRC reversed the ALJ. The OSHA-OSHRC dispute centered on section 9 of the statute, which provides that a citation fix a reasonable time for abatement.[68] The citation issued by the Secretary had ordered immediate abatement. The Commission, however, maintained that there could be no reinspection until the expiration of the fifteen-day period during which the employer was allowed to contest the citation. In the court's view, the Commission's interpretation of the statute would amount to permitting an employer "fifteen working days to correct a condition calling for immediate abatement, even though he did not contest the citation."[69] In siding with the Secretary, the court said, "the interpretation given a statute by the administrative agency charged with its enforcement should be accepted by the courts, if such interpretation be a reasonable one. And this is true even though there may be another interpretation of the statute which is itself equally reasonable."[70]

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[66] 492 F.2d at 501.

[67] 513 F.2d 533 (10th Cir. 1975).

[68] 29 U.S.C. §658(a) (1982).

[69] See, 29 U.S.C. §659(a): "If, within fifteen working days from the receipt of the notice issued by the Secretary, the employer fails to notify the Secretary that he contests the citation or the proposed assessment of penalty, and no notice is filed by an employee or representative of employees...within such time, the citation and the assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency."

By their decisions, these courts have recognized that interpreting agency regulations and statutory provisions is an essential aspect in the formulation of policy. That responsibility-- the formulation of policy-- these cases suggest, is vested in the Secretary and the Department of Labor.

Other courts have been even more explicit in maintaining that the policymaking responsibilities under the OSHAct reside with the Secretary. Examples of this view come from the Ninth Circuit and, more recently, from both the Third and the District of Columbia circuits.

In a case that involved the ability of the Secretary of Labor to compromise penalties that had been assessed by a Commission order, the Ninth Circuit held that:

> Policy-making is arguably a by-product of the Commission's adjudication. But the Act imposes policy-making responsibility upon the Secretary, not the Commission. Whatever "policies" the Commission establishes are indirect. Only those established by the Secretary are entitled to enforcement and deference in court.[71]

In a similar case, the Third Circuit, reviewing the legislative history of the OSHAct, concluded that "the Review Commission's mandate was strictly limited to adjudication."[72] The court amplified its position, saying that contrary to assertions of the Commission "that it is a major policy-making body under OSHA, the fact is that the Act confers all rulemaking responsibilities on the Secretary, not the Commission."[73] The court went on to hold that "the Review Commission was designed strictly as an independent adjudicator, with no rulemaking authority other than for procedural hearings, no direct policy role in administering the Act...."[74]

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[70] 513 F.2d at 554.

[71] DALE MADDEN CONSTRUCTION INC. v. HODGSON, 508 F.2d 278 (9th Cir. 1974).

[72] MARSHALL v. SUN PETROLEUM PRODUCTS, 620 F.2d 1176 (3rd Cir. 1980).

[73] Id. at 1183.

That position is also echoed in a recent decision of the District of Columbia Circuit. According to that court, citing Atlas Roofing,[75] "the [OSH]Act creates public rights that are to be vindicated by the Secretary through government management and enforcement of a complex administrative scheme.... [W]e are persuaded that enforcement of the Act is the sole responsibility of the Secretary."[76]

What these cases demonstrate is that, even though Congress may have departed from the traditional administrative structure when it divided rulemaking and adjudicatory authority between these two agencies, it did not depart so radically from the traditional administrative functions that it would, at the same time and with no legislative statement to indicate why, also divest the rulemaker of the authority to be the interpreter of its own rules and of the statute pursuant to which they have been promulgated.

C. The Contrary Position

It is by no means the unanimous judicial position that the Secretary's view is entitled to greater deference when it differs from that of the Commission. Several courts have, in fact, sided with the Commission and maintained that OSHRC was intended to exercise an independent judgment on the meaning of OSHA-promulgated standards. As a matter-of-fact, a majority of the circuits that have considered this issue appear to have sided with the Commission.[77]

Yet nothing in the legislation itself, the debates, or the accompanying reports can support such a conclusion. Nonetheless, the cases are there.

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[74] Id. at 1184.

[75] ATLAS ROOFING CO., INC. v. OSHRC, 430 U.S. 442 (1977).

[76] OIL, CHEMICAL AND ATOMIC WORKERS v. OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, 671 F.2d 643, 649 (D.C. Cir. 1982).

[77] For example, the Fourth, Sixth, Eighth, and possibly Second circuits favor the Commission. The First, Fifth, and Tenth circuits favor the Secretary. See generally, text and accompanying notes at pp. _____.

Brennan v. Gilles and Cotting, Inc.[78] is one such case. Gilles and Cotting, Inc. (Gilles) was the general contractor on a construction project at NASA's Manned Space Flight Center in Greenbelt, Maryland. Gilles had subcontracted the glass construction work on the project to Southern Plate Glass Company (Southern). Following the collapse of a scaffolding which caused the death of two workers on Southern's payroll, the Secretary of Labor issued citations against both Southern and Gilles for "serious violations"[79] of the safety regulations governing scaffolds.[80] Southern did not contest its liability, but Gilles challenged both the citation it had received and the proposed penalty. The ALJ decided two things: first, that the fatal scaffolding had been constructed in violation of OSHA's safety regulations; and second, that under the statute, Gilles, as the general contractor, was liable for safety violations that posed hazards to the employees of his subcontractors.[81] In a split decision, OSHRC reversed the decision of the ALJ. In exonerating Gilles, the Commission essentially maintained that none of Gilles's employees was "affected" by the hazardous condition of the scaffolding and that Gilles should not be held jointly responsible for the dangers that Southern's scaffolding created for Southern's employees.[82] The Secretary appealed.

In reviewing OSHRC's decision, the Fourth Circuit limited its inquiry to the issue of "whether, in addition to a subcontractor, a general contractor should be responsible for safety violations hazardous to a subcontractor's workers."[83] In other words, the issue reduced to a question of statutory interpretation: whether the term "employer" as used in the Act "should be interpreted to cover general contractors as 'joint employers'...or 'statutory employers'."[84]

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[78] 504 F.2d 1255 (4th Cir. 1974).

[79] See, 29 U.S.C. §666(j) (1982).

[80] 29 C.F.R. §1926.451 (1984).

[81] 504 F.2d at 1256, 57. According to the ALJ, Gilles was legally responsible under the Act because (1) Gilles's workers, as well as those of other subcontractors, had "access" to the hazard and could be exposed to injury from the scaffolding's collapse, and (2) in construction projects where subcontractors are also used, it is logical and necessary that overall safety and accident prevention be the responsibility of the general contractor.

[82] Id. at 1257.

The court readily admitted that the statute does not on its face resolve the question.[85] The answer, therefore, must be sought by divining the purpose of the legislation. In attempting so to do, the court rejected the mechanical application of the common-law definitional tests for "employee", as the Commission had urged. Because the states vary so in their "common" law analyses of "employee," such an approach would have been unavailing. The court correctly pointed out that "[a]s a Congressional enactment of nationwide application, OSHA requires a single consistent definition of 'employer' throughout the country so that there will be uniform application of this national legislation in all states."[86] According to the court, the operative consideration, therefore. should be "the purpose of the statute and not the technical distinctions of the common law."[87] Having concluded that the "purpose of the statute" should inform the construction to be given "employee" in this case, the court nevertheless decided that the question of whether the general contractor should be concurrently liable for his subcontractor's workers "can be answered either way."[88] It then inexplicably held that "since Congress has chosen the Occupational Safety and Health Review Commission as the enforcing agency [emphasis added], the choice between these two alternatives is appropriately committed to it."[89] Rather summarily this court rejected the Secretary's view that it is the Department of Labor to which such discretion is committed.

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[83] Id. at 1260.

[84] Id.

[85] Id.

[86] Id. at 1261.

[87] Id.

[88] Id.

[89] Id. at 1261-62.

The court conceded that the Secretary's rulemaking authority is broad. However, it here maintained that "it is the power to adopt rules or policies in adjudication [emphasis in original] which we are concerned with in this case. The statute vested adjudicatory functions in the Commission."[90] The court examined the legislative history and maintained that:

> As is made clear by the lengthy Congressional debates over enforcement procedures and the successful floor amendment withdrawing the Secretary's authority over adjudications... Congress deliberately created the Commission separate and independent of the Secretary.[91]

Yet that does not answer the relevant questions. There is no dispute that Congress created the Commission to be "separate and independent of the Secretary." The real question is how are these two concededly independent agencies intended to administer one regulatory program. The Fourth Circuit, it seems to me, misconstrues the intention of Congress in at least four respects.

First, contrary to the court's assertion, Congress did not choose the Occupational Safety and Health Review Commission as the "enforcing agency." The authority to enforce the statute clearly resides with the Secretary and OSHA. Second, the fact that adjudicatory authority is withheld from the Secretary does not necessarily mean that Congress also intended to withhold from the Secretary the authority to decide who might properly be subject to the coverage of the Act and its regulations. Third, the court worries that accepting the Secretary's approach would render the Commission as "little more than a specialized jury, an agency charged only with fact-finding."[92] Even if that be true, it is a choice that the legislature apparently has made, and no court should seek to re-allocate that legislatively determined division of responsibility. Finally, the court's assertion that "it is the power to adopt rules or policies in adjudication which we are concerned with in this case" ignores what the Commission has actually done in this instance. This is not an instance where the Commission has adopted "rules or policies" with respect to how the adjudication would proceed before the Commission. That, it seems to me, would occasion no problem at all. If that were the case, the Commission essentially would be doing what almost all other agencies are empowered to do-- to adopt rules of procedure to aid in discharging its duties and responsibilities. Rather, what the Commission has done here instead, and done with the approval of the court, is to decide what the general and substantive reach of a standard should be. And that is clearly a legislative determination, not an adjudicatory one, and as such, it is one for the Secretary to make. It is true, as the court points out, that "Congress intended that [the Commission] would have the normal complement of adjudicatory powers possessed by traditional agencies...."[93] But it is also true that Congress intended that the Commission have only adjudicatory powers. At least, in that respect, the Commission-- and with respect to legislative authority, OSHA-- are not traditional agencies. This decision of the Fourth Circuit would upset this congressional determination and, thereby, confer upon the Commission more authority than Congress intended it to exercise.

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[90] *Id.* at 1262.

[91] *Id.*

[92] *Id.*

Other circuits have come to substantially similar conclusions when confronted with a disagreement between the Secretary and the Commission. The Eighth Circuit has also concluded that, in such a circumstance, it is the Commission to whom the courts should defer. This court has gone so far as to say that "the Secretary may recommend an interpretation of a regulation to the Commission, but his recommendation does not necessarily control the Commission's conclusion."[94]

An early case from the Second Circuit appeared to adopt the view that it is the Secretary's determination that should be accorded special weight.[95] In one of that court's first enforcement proceedings under the OSHAct, it concluded that, because "Congress apparently placed primary reliance upon promulgation by the Secretary of specific regulations... [i]t is especially important that these regulations be construed to effectuate congressional objectives."[96] That statement would seem almost inexorably to place the Second Circuit on the side that advocates deferring to the Secretary on matters of interpretation. A more recent Second Circuit case, however, casts some doubt on such an inference.[97]

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[93] Id.

[94] BRENNAN v. OSHRC and RON M. FIEGEN, INC., 513 F.2d 713 (8th Cir. 1975).

[95] BRENNAN v. OSHRC and GEROSA, INC., 491 F.2d 1340 (2d Cir. 1974).

[96] 491 F.2d at 1343.

Western Electric, Inc. had been cited by the Secretary for violating an OSHA emergency regulation that required employer testing for the presence of vinyl chloride, a known carcinogen. Western Electric did not begin immediately to test for the presence of vinyl chloride because the company hygienist concluded that the plant did not use the raw materials that were suspected of producing the gas. Nonetheless, because of his concern for the workers' safety, the hygienist monitored the area he believed to be most susceptible to releasing vinyl chloride. OSHA, however, cited Western Electric for failing to monitor other areas as well. The ALJ, "relying on the plain language of the standard, which requires physical monitoring of any operation releasing vinyl chloride gas... held that Western Electric had violated the standard by failing to monitor [other areas]."[98] The review commission, however, set aside the ALJ's findings, maintaining that Western Electric could "reliably predict from the physical circumstances that the concentration of vinyl chloride would be well below the danger level set by the Secretary."[99] The Secretary, on the other hand, argued that such an interpretation of the standard was unreasonable in that "the standard expressly requires physical monitoring of every operation in which vinyl chloride is released . . . ."[100]

A Second Circuit panel reversed the Commission's decision. The reversal came, however, because the court determined that the Commission's interpretation was unreasonable. The court seemed to imply that, had the Commission's interpretation been a "more reasonable" one, it might have upheld the determination. The panel remarked that:

> this court has consistently held that its role is to decide whether the Commission's interpretation of the regulation is unreasonable and inconsistent with

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[97] MARSHALL v. WESTERN ELECTRIC, 565 F.2d 240 (2d Cir. 1977). _But see_, BROCK v. SCHWARZ-JORDAN, INC., 777 F2d 195 (5th Cir. 1985).

[98] 565 F.2d at 243-44.

[99] _Id_. at 244.

[100] _Id_.

> its purpose, the normal standard for review of the interpretation of a regulation by an agency charged with its administration.[101]

If what the court intended to suggest here is that, so long as there are reasonable but different interpretations of a regulation by OSHA and the review commission, it could or would enforce the review commission's interpretation, I think the court is wrong. That the review commission might give the regulation a reasonable interpretation is irrelevant. What is relevant is that Congress has reposed that authority, the authority to decide what a standard means in the Secretary, and it should not matter that others could or would be equally reasonable in their interpretations of the same standard. It is not their decision to make.

Such an attitude, I submit, reveals a fundamental misunderstanding of what Congress intended when it divided the administrative functions in this novel way. While it may be true that Congress did not wish to have the administrative functions combined as they are in the traditionally arranged agencies, there is no evidence whatsoever to indicate that Congress intended the Commission to set the substantive standards or to substitute its judgment for that of the Secretary, the administrative officer to whom responsibility for the substantive standards was committed. However sparse the legislative history may be-- and it is true that it could have been more helpful-- logic and administrative efficiency, if nothing else, argue that the role of the Commission is to adjudicate alleged violations of the standards, nothing more. What the standards mean, to whom they should apply-- those are legislative determinations, decisions that, absent a congressional directive to the contrary, are ordinarily vested in the promulgator of the rule. It then is an obvious usurpation for either the Commission or a reviewing court unilaterally to deprive the Secretary of that authority.

It is clear from the legislative history of the OSHAct that Congress, in trying to settle the quarrel over how the administrative functions would be allocated, was concerned primarily with resolving a political problem. By adopting this "split-enforcement" arrangement, Congress solved the immediate political problem-- who would make the rules, who would resolve disputes arising from those rules. Yet it is not clear that Congress solved the "administrative" problem it had been so preoccupied with. Perhaps while focusing too critically on the who, Congress may have ignored some of the more important ramifications of the choice it had settled on, or perhaps it did not fully appreciate the significance of the choices it had made or their likely consequences. It might have been expected that, when a single regulatory program is divided between two agencies, some conflicts would develop. Nowhere in the legislative history, however, is any thought or discussion devoted to that possibility, that eventuality. No guidance is provided regarding how potential conflicts should be resolved. It is almost as though Congress were totally oblivious to the possibility, the likelihood that tension and some measure of confusion would develop between these two agencies. Neither the agencies involved nor the courts, however, are given any legislative indication of how Congress intended potential institutional conflicts to be resolved. Simply to repose rulemaking and enforcement authority in one agency and adjudicatory authority in another may have seemed, at first, a neat resolution to a vexing political problem. It, however, was but the beginning of several others.

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[101] Id. See also, BRENNAN v. OSHRC and GEROSA, INC., 491 F.2d 1340, 1344 and n. 1 (describing as "simplistic" the thought that the meaning of a regulation might best be fathomed by its author, here the Secretary). Accord, BRENNAN v. OSHRC and UNDERHILL CONSTRUCTION CORP., 513 F.2d 1032 (2d Cir. 1975).

V. INSTITUTIONAL CONFLICTS: The MSHAct

Even though Congress did attempt to clarify the division of responsibilities between the Mine Safety Administration and the Mine Safety and Health Review Commission, there nonetheless have been some "turf fignts" between the two agencies. The disagreements, however, do not appear to have been as frequent as those between OSHA and OSHRC. In one case, a court indicated that a bulletin from the Labor Department interpreting a provision of the MSHAct "is entitled to deference unless it can be fairly said not to be a reasoned and supportable interpretation of the Act."[102] Because that case involved a situation where the Secretary and the review commission-- although not the administrative law judge-- were in agreement on the interpretation of the act, it provides no basis for determining how the court would have decided the issue had the two agencies disagreed regarding the interpretation.

At least one court has had the opportunity squarely to face that issue, but the court declined to do so because, as the court put it, "the Commission's construction [was] plainly incorrect and insupportable by the terms of the Act."[103] The case involved a question regarding the right of a representative of mine workers to participate in so-called "spot" inspections of the mines without suffering a loss of pay.[104] The Commission had held that the representatives were entitled to pay only for what are called "regular" inspections, that is, inspections of a mine in its entirety. The Secretary's position was that the act entitled the representatives to receive their pay-- often called walk-around money-- for any inspection they observed.

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[102] MAGMA COPPER COMPANY v. SECRETARY OF LABOR, 645 F.2d 694, 696 (9th Cir. 1981).

[103] UNITED MINE WORKERS OF AMERICA v. FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION, 671 F.2d 615 (D.C. Cir. 1982).

The court sided with the Secretary's reading of the statute. But it felt no necessity to decide the more general question, observing that:

> . . . [the] Secretary of Labor has raised the issue of whether, as a general procedural matter, his interpretation of the Act or that of the Commission is entitled to "special weight." The Court need not decide what weight should generally be afforded to a decision by the Commission relative to that given a conflicting interpretation by the Secretary, since in this instance, the Commission's construction is plainly incorrect and insupportable by the terms of the Act and therefore entitled to no deference.[105]

Nonetheless, in pressing its claim before the D.C. Circuit, the Secretary made many of the same arguments that have frequently been advanced in the OSHA-OSHRC dispute: the rulemaking, enforcement, and prosecution powers under the MSHAct are assigned to the Secretary. It is the Secretary who promulgates safety and health standards, carries out statutorily mandated inspections, enforces citations and orders, proposes and collects civil penalties, and defends his actions before administrative and judicial tribunals. The Commission, on the other hand, is given but three functions, all of which are analogous to judicial functions: to adjudicate contested cases, to assess civil penalties, and to approve settlements in cases pending before it.[106]

The Secretary also maintains that deference should be paid to the Secretary's construction of the act's provisions because "as opposed to the Commission, he was involved in the development of the Act. The Commission, on the other hand, is a creature of the Act."[107]

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[104] 30 U.S.C. §813(a) & (f) (1982).

[105] 671 F.2d at 623, n. 26.

[106] See Brief of Petitioner (Secretary of Labor) at 52, MARSHALL v. UMW, 671 F.2d 615 (D.C. Cir. 1982).

Even though the court did not resolve the deference issue in the walk-around money case, the Labor Department considers the case a major victory for the Secretary and the Department in clarifying the agencies' respective roles.[108]

Another "turf" battle between the Secretary and MSHRC has now made its way to the District of Columbia Circuit for resolution.[109] The issue in this case is whether, under the MSHAct, the Secretary may cite the owner-operator of a mine for a violation committed by its independent contractor.[110] The Secretary's says yes. MSHRC's answer is no. According to the Secretary, there is a history of judicial precedent which endorses his right under the act to determine whom to prosecute-- precedent which the Commission, attempting to enhance its "policymaking" role under the act, has chosen to ignore.[111]

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[107] _Id_. at pp. 53-54.

[108] Interview with Cynthia Attwood, Associate Solicitor, and Michael A. McCord, Counsel, Appellate Litigation, Mine Safety and Health Administration, Office of the Solicitor, Arlington, Virginia (September 7, 1985).

[109] DONOVAN v. CATHEDRAL BLUFFS, Docket No. 84-1492, (D.C. Circuit).

[110] _See_, Brief of Petitioner (Secretary of Labor), DONOVAN _v._ CATHEDRAL BLUFFS, Docket No. 84-1492, filed, January 18, 1985, District of Columbia Circuit.

[111] CATHEDRAL BLUFFS is, among other things, a case regarding the extent of the Secretary's "prosecutorial discretion" in enforcing the Mine Act and how the exercise of that discretion should be viewed by the Commission. The Secretary's view is that the Act gives him broad discretion to determine against whom to enforce the provisions of the Act and that the Secretary's determination cannot be overturned without demonstrating that he has abused that discretion. Oral argument was held in DONOVAN v. CATHEDRAL BLUFFS SHALE OIL CO. on September 13, 1985.

The case was decided on July 29, 1986, _sub._ _nom._ BROCK v. CATHEDRAL BLUFFS, _____ U.S.App.D.C. _____, _____ F2d.__ (D.C. Cir. 1986). On the deference question, the court sided with the Secretary, saying at n.2: "We see no reason to depart from the view we announced, with regard to the Mine

But the number of such disputes between MSHA and MSHRC pales in comparison to those between OSHA and OSHRC. What can account for such differences? Why does this arrangement appear to have worked, with minimal difficulty in the one case, and to have been so fraught with problems in the other?

To be sure, the mine-safety statute was enacted seven years after the OSHAct. OSHA and OSHRC are the first major regulatory agencies to have to contend with so complete a separation of functions. There are always unforeseen problems in being first. FMSHA and FMSHRC have had the advantage of observing and, therefore, avoiding some of the initial mistakes that plagued the occupational-safety agencies. Yet that fact alone may not explain all differences.

On the deference question, part of the explanation for the relative absence of disputes between FMSHA and FMSHRC may well be attributed to the legislative history of the mine statute, which directs both the Commission and the courts to accord "weight" to the Secretary's determinations.[112] With such a statement, Congress at least went on record, suggesting that, as a primary matter, the Secretary's construction of this statute and of the regulations promulgated pursuant to it are to be highly valued. Of course, such a statement does not in and of itself implement the congressional intention, but it does minimize the potential for conflicts, and, at the same time, it raises a heavy presumption against anyone who would ignore or discount the Secretary's interpretation. It may not be worth much, but it must surely be worth more than no congressional directive at all.

There are other possible reasons to explain the relatively smooth accommodations that have been achieved by FMSHA-FMSHRC. Chief among them may be the narrower scope of their activities and responsibilities. The FMSHAct governs only mining. There is much more finiteness in its scope. The population is a limited one-- miners and mine operators. And the health and safety hazards to which mining exposes its workers tend to be the same, wherever the mine is located. The OSHAct, on the other hand, governs everything else, and everything else is a vast universe of companies, industries, firms, enterprises, you name it. Their only commonality may be that they all have employees. Mine-safety officials emphasize the significance of this difference between themselves and their OSHA counterparts. According to one

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Act, in Carolina Stalite, which leaves interpretive discretion where it normally resides, with the policy-maker rather than the adjudicator."

[112] See, note _____ supra at , and accompanying text.

FMSHA official, his agency can obtain at almost any moment a virtually precise record of the numbers of mines and miners subject to its jurisdiction. With such discrete responsibilities, he maintains, FMSHAct agencies can become really expert in the industry and in the regulatory matters under its supervision.[113]

Not only that, but the regulatory powers of FMSHA may also explain why the FMSHAct agencies have not been as beleaguered by conflicts as OSHA and OSHRC have been. Mine inspectors possess enormous power under the mine-safety statute and, therefore, may be able, in the first instance, to induce a greater degree of cooperation from mine operators. For example, under the statute, an inspector's entry onto the mine is authorized.[114] Furthermore, the statute prohibits advance notice of a mine inspection.[115] It also empowers the Secretary to order an immediate abatement of hazards detected and to close off access to a mine until the violation is abated.[116] In short, a mine-safety inspection official can exact almost immediate compliance from a mine operator. OSHA inspectors, on the other hand, cannot obtain such immediate results. In fact, OSHA citations to abate can be stayed until after a decision by OSHRC. So, in an OSHAct case, there may be little reason initially to comply with the Secretary's citation. One has little to lose. But, because of the immediacy of the FMSHA inspector's citation and unless the operator believes the citation to be utterly frivolous or egregious, there is every reason to comply at once. There is, in fact, too much to lose, particularly when one's mining operation could be halted or severely curtailed. MSHAct officials maintain, however, that there is little likelihood of a frivolous or egregious citation, because all their inspectors are or were themselves miners, who generally would be more capable of making realistic assessments of mining hazards than would be inspectors unschooled in the industry.[117]

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[113] Interview with Frank O'Gorman, Federal Mine Safety and Health Administration, Arlington, Virginia (February 3, 1986).

[114] 30 U.S.C. §813(a).

[115] Id.

[116] Id.

[117] Interview with Frank O'Gorman, Federal Mine Safety and Health Administration, Arlington, Virginia (February 3, 1986).

VI. GREATER DUE PROCESS?

The institutional conflicts-- the problem of deference-- has been a great problem with the split-enforcement model, at least with the OSHAct agencies. But the deference problem, the problem of institutional conflicts surfaced only after the passage and implementation of the OSHA statute. Perhaps the problem should have been forecasted or anticipated. But, for whatever reasons, the issue did not figure in the legislative discussions. What did figure very prominently in the legislative discussions-- with respect to both the OSHAct and the FMSHAct-- was the notion that such a strict separation of rulemaker from the adjudicator would enhance the prospects for due process and thereby instill greater confidence in the regulatory programs. The legislative proponents of both statutes focused much of their discussion and attention on the enhanced prospects for due process that this split-enforcement scheme was expected to ensure. Have those predictions been borne out? Does the split-enforcement arrangement ensure, any more so than the traditional, cohesive agency structure, that due process will be enhanced, that the regulatory programs themselves would be perceived to be more credible?

It is very difficult-- if not impossible-- empirically to demonstrate that the one arrangement is "better" than the other in providing due process. Even though the traditional model has withstood constitutional challenges to its housing all the administrative apparatus under one roof,[118] the impression persists that no agency that may, at the same time, be responsible for licensing, policing, adopting rules, and deciding challenges can be completely fair and objective when those rules or policies are challenged before it. That impression appears to be based on the view that no matter how many bars, barriers, or Chinese walls are erected to shield the policymakers and the prosecutors from the quasi-judicial authorities, the agency itself still maintains a vested interest in ensuring that a particular result is reached, that particular policies are protected or advanced. Whether that assumption is provable or not, it _is_ a frequent impression.

The answer then may well be that it does not ultimately matter whether the split-enforcement model does, in fact, ensure any more due process or instill any more confidence than the traditional administrative arrangements. What may matter more is what advantage one _thinks_ or _believes_ the one model may possess over the other. And that, of course, depends on whom one talks to and on what one's interests in a particular regulatory program may be.

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[118] _See_, e.g. WITHROW v. LARKIN, 421 U.S. 35 (1975); FEDERAL TRADE COMMISSION v. CINDERELLA CAREER AND FINISHING SCHOOLS, 404 F.2d 1308 (D.C. Cir. 1968).

One industry observer maintains that the split-enforcement model with the consequent independent adjudicator "balances" the sometimes over-aggressiveness of the rulemaker, in this instance-- the OSHA rulemaker. A separate and independent adjudicator evens out the odds.[119] Implicit in that observation, it seems to me, is the belief that recourse to an agency other than the one that promulgated the challenged standard is a sine qua non of due process. According to this observer, "there is a good argument to be made that the °policeman' should not also be °judge' and °jury'; he's got too much to lose. How can he be °right' in issuing a citation on one side and °wrong' when he adjudicates it on the other?"[120]

This observer further maintains that even greater due process would be assured if members of the review commission are conversant, if not necessarily expert, in specific health and safety areas. If the adjudicator had more of a working scientific knowledge or knowledge of particular industries and their hazards, the Commission could be expected to reach a more "realistic" assessment regarding alleged violations. According to this observer, as it now stands, many industry officials simply calculate their costs of compliance to determine which is more economical-- acceding to OSHA's rule, however irrational one might think it or challenging the rule before the Commission and perhaps in the federal courts.[121] That is, due process becomes a bottom-line consideration, and it sometimes may be cheaper (better?) to switch than fight.

As one might expect, an observer from organized labor has a somewhat different view. Labor, it may be recalled, advocated vesting all the administrative powers of the OSHA program in the Department of Labor. According to one labor official, it is not that the independent adjudicator ensures that there will be more due process. What it does ensure-- at least, what has happened with the OSHAct-- is a process that was not originally intended. "Too often," she contends,, "what OSHRC has engaged in is a review not of the law, but of the facts, of OSHA's judgment of the risks and hazards, and that was never contemplated when the statute was adopted."[122] In addition, she also contends that the Commission's willingness to engage in those factual reviews has led to interminable delays in disposing of some OSHA citations. "Some cases from 1978," she says, "still remain unresolved. Can that honestly be called more due process. If so, for whom?"[123]

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[119] Interview with David Sarvadi, Vice President, A.F. Meyer and Associates, McLean, Virginia (December 16, 1985).

[120] Id.

[121] Id.

Despite those criticisms, there are some government officials who do advocate a more general use of the split-enforcement model.[124] In fact, the Associate Solicitor at MSHA believes the split-enforcement model is much to be preferred. She concedes that there may be some sacrifices in efficiency and policy coordination. Nonetheless, she maintains that those sacrifices are far outweighed by the benefits that are derived from having the "institutional conflicts" on the public record for examination, discussion, evaluation. Intra-agency disputes, she maintains, are frequently resolved with no public awareness of the considerations that may have informed the resolutions. She believes that it is much more likely that resolutions achieved in a split-enforcement arrangement are achieved openly and with more public knowledge and understanding of the compromises and accommodations reached.[125] Of course, this unqualified endorsement of the split-enforcement model comes from one whose experience with it generally has been very good, and that may well be attributable to both the discreteness of the mine-safety program and the clarity with which its congressional proponents expressed themselves on the division of authority.

From one whose agency's experiences with the split-enforcement model have not been uniformly good, there comes neither a wholesale condemnation nor an aversion to its more general use. Rather there is an insistence that any future programs employing the split-enforcement model be much more carefully drafted so that it is clear what each agency's responsibilities are. According to this observer, if more due process is the desideratum, it should be unarguably clear precisely what authority each agency has.[126] Otherwise, rather than ensuring more due process, the resulting confusion may assure none.

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[122] Interview with Peg Seminario, Assistant Director, Department of Occupational Safety and Health and Social Security, AFL-CIO, Washington, D.C. (February 10, 1986).

[123] *Id.*

[124] Interview with E. Ross Buckley, Chairman, Occupational Safety and Health Review Commission, Washington, D.C. (August 8, 1985).

[125] Interview with Cynthia Attwood, Associate Solicitor, Mine Safety and Health Administration, Office of the Solicitor, Arlington, Virginia (September 7, 1985).

VII. CONCLUSION

Is the split-enforcement model to be preferred over the more traditional unitary arrangement? In the end, that question may well be unanswerable. It, is of course, debatable whether one model is "better" than the other. Whatever may be one's attitude about the perceived advantages of the split-enforcement model-- greater assurance that due process prevails or more confidence on the part of those subject to the regulatory authority-- there is indeed a greater necessity that split-enforcement programs be more carefully designed than the unitary administrative programs.

If the OSHA experience is any example, and it must be some, a major problem likely to confront any regulatory program divided between two agencies is that of the inherent institutional conflicts that can develop. It might have been in 1970 when the OSHA statute was enacted-- and it may still be-- a salutary and commendable idea completely to separate rulemaking and enforcement powers from the adjudicatory ones. Whatever ideas may have informed the original decision-- greater confidence in the program, enhanced prospects for due process, or simply a quick solution to a troubling political problem-- it is now evident that the total separation of functions has not worked in the OSHA program as Congress and its other champions must have hoped.

The major oversight in the OSHA legislation, it seems to me, though not necessarily in the concept itself, was in Congress's failing seriously and carefully to examine the possible administrative and judicial difficulties this bifurcation of responsibilities would create. It may have been possible in 1970 to ignore the potential problems in the expectation (the hope?) that none would develop and that, even if some did, the two agencies themselves could solve them. That possibility no longer exists. Nor may it be possible any longer sanguinely to expect the twelve branches of the Court of Appeals to solve these institutional problems. To be sure, the Supreme Court could provide a resolution, assuming that it considers the problems important enough to merit the high court's attention. But not even a Supreme Court decision would guarantee that these issues, particularly the deference question, would be resolved in the way the legislature would choose.[127] The OSHAct, the regulatory program it established, and the review commission it created are all creatures of the legislature. The legislature, therefore, ought clearly to indicate how it intends them all to function.

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[126] Interview with Frank White, Associate Solicitor, Occupational Safety and Health Administration, Washington, D.C. (August 28, 1985).

As for the prospects of greater due process, it simply is not possible at this time to say whether the split-enforcement model is better at achieving it.[128] It should not be pretended, nor is it here intended to be suggested, that the traditional administrative model is not susceptible to intra-agency conflicts that may often rival those which have been seen to exist with the split-enforcement model. Nonetheless, such intra-agency conflicts are more easily, even if not more readily, resolved because the ultimate responsibility for decision devolves on a single chief administrator or a single multi-member agency. The decision of that administrator or that agency is definitive, subject to reversal only by a court of competent jurisdiction or revision by the legislature. The same cannot be said of a regulatory program, responsibility for which is divided between two agencies. Divided regulatory programs must be expected inherently to encounter more administrative problems and difficulties than might a similar program housed entirely under one administrative roof. Such a program is, in a very real sense, potentially and practically, the servant of two masters, and of possibly many more when the reviewing courts are counted. No program can be efficient or effectively administered in such a divided environment unless the responsibilities of each agency are carefully delimited.

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[127] _See_, _e.g._, CUYAHOGA VALLEY RAILWAY CO. v. UNITED TRANSPORTATION UNION, _____ U.S. _____, 106 S.Ct. 286 (1985). Although not specifically addressing the deference issue, this recent Supreme Court decision may conceivably augur the Court's view on the deference question. In considering whether the Commission could prevent the Secretary from withdrawing a citation issued by his department, the Court, in a _per curiam_ opinion, held that "the Secretary has unreviewable discretion to withdraw a citation charging an employer with violating the Occupational Safety and Health Act." Furthermore, the Court also said that "it is the Secretary, not the Commission, who sets the substantive standards for the work place, and only the Secretary has the authority to determine if a citation should be issued to an employer for unsafe working conditions, 29 U.S.C. §658 . . . . The Commission's function is to act as a neutral arbiter and determine whether the Secretary's citations should be enforced over employee or union objections."

[128] With only the examples of OSHA-OSHRC and FMSHA-FMSHRC from which to reason, it may be premature to attempt any generalizations regarding the desirablitity of this model over the traditional unitary model. Furthermore, how would one determine which model (or which agency operating under which model) would represent the "control" group for comparison purposes?

When it enacts a program using the split-enforcement model, Congress, therefore, has a special obligation to draw the perimeters of each agency's responsibilities. A mere declaration or statement that one agency's determinations should be given special weight may be sufficient. Such a statement appears to have aided in minimizing conflicts between MSHA and MSHRC.

The congressional proclivity to legislate very broadly and generally, to leave the details later to be worked out, while fraught with potential danger in the traditional model, is particularly dangerous when regulatory responsibilities are divided between two agencies. Therefore, in any future use of the split-enforcement model, the responsibility of the rulemaker, the adjudicator, and the reviewing courts should be set forth with grater specificity that some recent Congresses have been wont to demonstrate. The tendency to do less should be resolutely avoided. As a general matter, the rulemaker should clearly be created to function as the policymaker, and the other participating agents-- both the quasi-adjudicatory agency and the courts-- must be required to see him that way and to restrain their impulse to usurp that role. And once Congress has clarified the responsibilities and authorities of the two independent agencies, the agencies and the reviewing courts then have a concomitant responsibility to ensure that their assigned limitations are observed.

When considering future uses of the split-enforcement model, Congress should also refrain from placing too much on a program's regulatory agenda.[129] Some of the OSHAct agencies' problems may stem from the sheer magnitude of their tasks. Likewise, much of the success of the MSHAct agencies must be attributed to the manageability of their charge.

In the area of occupational safety and health, the statute and, as a result, the whole regulatory program could be improved in one important way. The OSHAct should be amended unambiguously to provide that, in adjudicatory challenges to standards promulgated by the Secretary pursuant to his authority under the statute, the review commission must accept the Secretary's interpretation of the standard as conclusive, unless it clearly can be shown that the Secretary's interpretation is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.[130] The same standard should guide a reviewing court in discharging its responsibilities under the act. While such an amendment may not completely eliminate conflicts between the agencies (what could?), it should certainly go far toward minimizing them.[131] The arbitrary-and-capricious standard is, by no means, a talisman capable of magically transforming a confusing regulatory scheme into a more intelligible and predictable one. It is, however, a standard with which judicial authorities have had long experience and which they can be expected more uniformly to apply. It is, after all, a court to which the Occupational Safety and Health Review

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[129] No doubt this admonition should also caution against repeating the OSHA experience with the "consensus" standards. If a regulatory agency is required to adopt pre-existing rules or standards from some other source, private or otherwise, there is a special obligation on the part of Congress to "instruct" the adopting agency as to how these adopted rules or standards should be enforced in their new administrative milieus. See, M. Rothstein supra n._____.

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[130] *See* 5 U.S.C. §706 (2)(A).

[131] In comments to the Administrative Conference on this report, OSHRC concedes that certain institutional conflicts did exist between OSHA and the review commission. According to OSHRC, "This occurred in large part because OSHA and OSHRC were the first agencies to operate under so complete a separation of functions in administering a single statute. Further, as the consultant's report indicates, some ambiguities in the OSH Act and its legislative history regarding the roles of each agency also contributed to the conflict." OSHRC maintains, however, that "[a]s a result of judicial decisions and its own experience, most of the institutional disputes between the Commission and OSHA have been resolved. Therefore, the Commission does not believe that it is necessary to amend OSH Act to specify more clearly the scope of the authority of the respective agencies. However, the Commission believes that it would be helpful if Congress uses as much specificity as possible in defining the roles of the agencies, if the split-function scheme is adopted in other areas of the law. Thus, some of the uncertainty the Commission faced in its early days would be avoided."

See, OSHRC "COMMENTS REGARDING THE COMMITTEE ON ADJUDICATIONS'S PROPOSED RECOMMENDATIONS ON THE 'SPLIT-ENFORCEMENT MODEL FOR AGENCY ADJUDICATION'", pp.5-6 (August 20, 1986).

Commission compares itself.[132] Such an amendment would give specific legislative endorsement to what one can only surmise to be the unarticulated assumption on which Congress based this bifurcated scheme.[133] The split-enforcement model may

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[132] Interview with Paul A. Tenney, Chief Administrative Law Judge, Occupational Safety and Health Review Commission (August 28, 1985).

[133] The OSHAct might be further improved with a second amendment. Congress should consider amending section 12 of the OSHAct to expand the Commission 's membership to five from the current three. See 29 U.S.C. §661(a) (1982).

If one but focuses on the work-load of OSHRC in comparison to that of the larger MSHRC, one might be persuaded, even without more, that OSHRC's membership should be enlarged.

For example, in fiscal year 1981, OSHRC received 3,739 notices of contest. Most of these contested decisions were disposed of without hearings. Nonetheless, the agency's ALJs did render 415 decisions; the Commission itself rendered 215. In FY-1982, the corresponding figures were 1,489; 218; and 168. In FY-1983, they were 1,223; 166; and 102. The FY-1984 numbers were 1,307; 159; and 88. The FY-1984 figures were 1,435; 164; and 53. (STATISTICS PROVIDED BY OSHRC OFFICE OF PUBLIC INFORMATION)

By contrast, in FY-1981, MSHRC ALJ's received 2,350 penalty and contested review citations. In that period, the Commission itself disposed of 116 cases, a number which includes petitions for discretionary review that were granted, petitions that were denied, decisions and orders terminating cases, as well as cases continued from the previous year. In FY 1982, the comparable numbers were 1,450 and 107. The FY-1983 figures were 1,243 and 67. The figures for FY-1984 were 1,412 and 72. In FY-1985, the comparable figures were 1,490 and 59. (STATISTICS PROVIDED BY FMSHRC OFFICE OF GENERAL COUNSEL)

Of course, the contrary argument might also be advanced--that is, that MSHRC is indeed too large and its membership should be decreased. The major problems, however, do appear to have existed with the smaller OSHRC and its disproportionately heavier caseload.

Enlarging the review commission to five would allow its work to continue with minimal interruption or delay when a vacancy occurs. With a three-member commission, one vacancy can seriously retard its work; two could virtually paralyze it. See, Rothstein, supra n. _____.

In addition, Congress might also consider empowering the commission to operate in panels of three, with the well have advantages over the traditional, unitary model. It may not. It may be that whatever advantages do exist with the split-enforcement model are only perceived ones. Whether the advantages of the split-enforcement model be only perceived ones or not, it will matter little if Congress does not take care to ensure that its intent is more clear, less ambiguous. Otherwise, whatever benefits Congress might intend, or whatever advantages might be expected from such an arrangement could all be lost in confusion and in debilitating bureaucratic struggles.

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requirement that the affirmative vote of three members be necessary to direct a case for review. The commission could still retain the authority to decide important cases en banc. Such an arrangement already exists and works well with the Mine and Health Review Commission. On an expanded commission, members would be appointed for staggering terms of five years. A five-member commission would avoid the sort of inertia that could hamper the commission's work when a vacancy exists. During much of early 1985, OSHRC's work came to a virtual halt because it had only one member. By August 1985, the Commission was again at its full complement; however, two of the three members at that time held recess appointments. Such gaps in continuity could be avoided if the OSHAct included a hold-over provision for departing members. The absence of a hold-over provision is an obvious deficiency in the statute. See, 29 U.S.C. §661(a).

A larger commission would not so easily be subject to frequent shifts in policy. To be sure, under the suggestion, a new commissioner would be appointed every year; however, the incremental impact of such an appointment would be less severe and potentially less jolting than it would be on a three-member commission. On a three-member panel the replacement of a single member may, at any time, radically alter commission policy. Increased confidence also was regularly cited by proponents as a principal reason for favoring the split-enforcement model. A measure of stability in the adjudicatory process and in the development of commission precedents is essential to obtaining that desired confidence. A five-member commission should help to promote that requisite stability.

BACKGROUND REPORT FOR RECOMMENDATION 86-5

THE MEDICARE APPEALS SYSTEM FOR COVERAGE AND PAYMENT DISPUTES

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Report to the Administrative Conference of the United States

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INTRODUCTION

Beneficiaries of the Medicare program and the health care professionals and institutions that serve these beneficiaries have seriously questioned the adequacy of the Medicare appeals system for disputes over the coverage of and payment for Medicare benefits. Two major developments have precipitated this inquiry. First, the prospective payment system for hospitals, adopted in 1983, has wrought monumental changes throughout the Medicare program. Specifically, implementation of the prospective payment system has resulted in increased utilization of outpatient services by Medicare beneficiaries and, consequently, in addition to changes in appeals of hospital payment issues, the number and complexity of appeals regarding all types of Medicare benefits has increased.

The second factor is the long term, continuing and profound dissatisfaction with certain aspects of the Medicare appeals system among beneficiaries and providers. In the last five years, the Supreme Court and other federal courts have made many important decisions in cases challenging the Medicare appeals system for coverage and payment disputes. Many of these decisions have raised basic questions about the fundamental fairness of the Medicare appeals system for both beneficiaries and providers.

As a result of these and other developments, beneficiary and provider groups and also Congress have become more concerned about problems with Medicare appeals and interested in considering reforms. Indeed, in its report on the Consolidated Omnibus Budget Reconciliation Act of 1985, the House Ways and Means Committee acknowledged the need for a thorough review of the Medicare appeals system:

> It has been thirteen years since this Committee has looked substantively at medicare's [sic] appeals procedure. Since that time the medicare program has undergone major changes. Inpatient hospital services that were reimbursed on a cost basis are now mostly subject to the prospective payment system. An increasing amount of services once provided only on an inpatient basis are now being provided in ambulatory settings. As a result of these current changes, the Committee believes that the current hearing and appeal procedure under medicare needs to be reviewed.[1]

In its budget bill for FY 1987, the House Budget Committee has proposed reforms of the Medicare Appeals System in some areas.[2]

This study of the Medicare appeals system analyzes those processes available for beneficiaries and hospitals to appeal coverage and payment determinations under Part A and Part B of the Medicare program. The analysis reflects comments, concerns and observations of government officials, congressional staff and interest group representatives and their counsel who are closely involved with the Medicare program and its appeals system.

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[1] H.R. Rep. No. 241, Part I, 99th Cong., 1st Sess. 45-46 (1985).

[2] H.R. 5300, 99th Cong., 2d Sess. (1986). See H.R. Rep. 727, 99th Cong., 2d Sess. 95-96, 158-59 (1986). See notes 351-355 infra and accompanying text.

The first chapter explains the Medicare program and touches briefly on some of the program's monumental accomplishments. The second chapter describes the threatening problem of escalating costs of providing services to beneficiaries--a problem that it is fair to say has had a dispositive influence on the policies and conduct of the Department of Health and Human Services and the Health Care Financing Administration in administering the Medicare program. The third chapter outlines the appeals procedures for payment and coverage disputes under Part A and Part B of the Medicare program. The next three chapters recount reported problems and concerns about the Medicare program and its appeals process in three areas: (1) program administration, (2) administrative hearing, and (3) the availability of administrative and judicial review.

Chapter VII contains some preliminary recommendations for changes in the Medicare appeals system. However, for some issues, it is necessary to obtain additional empirical information to understand their full dimensions. Consequently, for these issues, Chapter VII makes suggestions for further study with a view toward making recommendations in the future. In proposing recommendations and making suggestions for further study, this analysis is acutely aware that the Medicare program operates under unprecedented budgetary pressures and that curtailment of the administrative expenses associated with the Medicare program is in the best interest of this nation as well as, ultimately, beneficiaries and providers of the Medicare program.

CHAPTER I: THE MEDICARE PROGRAM

In 1965, Congress established the Medicare program to provide health insurance for the aged.[1] At this time, the problem of access to quality health care services for the aged was especially severe. In 1963, only 56% of the aged had health insurance and yet had a greater risk of illness and far lower income than other population groups.[2] As President Lyndon B. Johnson stated when he signed the Social Security Amendments of 1965, the hope was that Medicare would remove financial barriers to quality health care services for the elderly:

> No longer will older Americans be denied the healing powers of modern medicine. No longer will illness crush and destroy the savings that they have so carefully put away over a life time so that they might enjoy dignity in later years.[3]

Enactment of the Medicare program was truly an extraordinary event. There was formidable ideological opposition particularly from the medical profession that feared government control of medical practice.[4] The hospital industry was somewhat more receptive to the concept since the program would assure predictable payment for hospital services in an unprecedented manner.[5] Nevertheless, the passage of the Medicare program, and also the Medicaid program, faced considerable obstacles and was probably possible only because of the 1964 landslide victory of Democratic President Lyndon B. Johnson and his subsequent skillful management of the legislation in Congress along with the support of key congressmen.[6]

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[1] Social Security Amendments of 1965, Pub. L. No. 89-97, Title I, §§ 101-111, 79 Stat. 291 (1965) [hereinafter cited as "Social Security Amendments of 1965"], codified as amended in, Social Security Act, Title XVIII, 42 U.S.C. § 1395 et seq. (1982 ed., Supp. II).

At the same time Congress enacted the Medicaid program providing health insurance for some poor. Social Security Amendments of 1965, Title I, § 121-122, codified as amended in, Social Security Act, Title XIX, 42 U.S.C. § 1396 et seq. (1982 ed., Supp. II).

[2] Gornik, Greenberg, Eggers & Dobson, Twenty Years of Medicare and Medicaid: Covered Populations, Use of Benefits, and Program Expenditures, Health Care Fin. Rev. 13, 14 (1985 Annual Supp.), [hereinafter cited as "Twenty Years of Medicare and Medicaid"].

[3] Remarks at the Signing of the Medicare Bill, July 30, 1965, Public Papers of the Presidents - Lyndon B. Johnson, 1965, Vol. II, 811, 813.

[4] See J. Feder, Medicare: The Politics of Federal Hospital Insurance (1977); T. Marmor, The Politics of Medicare (1973); R. Myers, Medicare (1970); Cohen, Reflections on the Enactment of Medicare and Medicaid, Health Care Fin. Rev. 3 (1985 Annual Supp.).

[5] See A. Somers & H. Somers, Medicare and the Hospitals (1967).

The political circumstances of the passage of the Medicare program, and also the Medicaid program, explain their design. The initial House bill provided only for hospital insurance for the aged; supplementary medical insurance to cover physicians' services was added in an effort to broaden support for the bill among Republican congressmen.[7] What finally emerged in the Social Security Amendments of 1965 were three distinct programs: the Medicare Hospital Insurance Program ("Part A"), the Medicare Supplementary Medical Insurance Program (Part B") and the Medicaid Program.[8] Each of these programs has different benefits, is financed and administered independently and pays for services according to different methodologies.

A. The Structure of the Medicare Program

The Medicare program is fundamentally different from most other federal entitlement programs as it does not provide cash benefits directly to its beneficiaries. Rather, the program relies on hospitals, other health care institutions and physicians to provide benefits to its beneficiaries. The Medicare program even leaves the determination of the amount of covered benefits that should be provided to beneficiaries in specific cases to physicians and health care institutions. This arrangement is consistent with the tradition in the American health care system that the determination of what medical treatment should be accorded in a particular case is primarily the province of the medical profession.[9] Under state medical licensure laws[10] as well as the prevailing accreditation standards for hospitals,[11] only physicians, with their specialized knowledge and judgment acquired through years of medical education and training, can treat all types of human disease, admit patients to hospitals and, once in the hospital, determine the hospital resources used for their care.[12]

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[6] Cohen, supra note 6.

[7] See J. Feder, supra note 6; T. Marmor, supra note 6; Cohen, supra note 6. The Medicaid program evolved from a proposal of the American Medical Association that sought to build on existing Medical Assistance programs for the poor.

[8] Medicaid is a joint federal-state program providing hospital, physician and extensive nursing home services for persons on the Aid to Family with Dependent Children and Supplemental Security Income programs and, if the state elects, for persons who, but for income, meet the eligibility criteria for these categorical assistance programs. Social Security Act § 1902(a)(10), 42 U.S.C. § 1396a(a)(10) (1982 ed., Supp. II). Medicaid is financed out of federal revenues from general appropriations which match state expenditures for the Medicaid program. State programs must meet certain federal requirements to qualify for these federal matching funds. Social Security Act §§ 1901 and 1902(a), 42 U.S.C. §§ 1396 and 1396(a) (1982 ed., Supp. II). This study does not address appeals under the Medicaid program which are handled primarily by the states.

[9] Medicare has acknowledged this basic characteristic of the American health care system in its requirement that a physician -- defined broadly under the statute to include osteopathic physicians, optometrists, podiatrists, dentists

Medicare is an enormous program, serving over 30 million individuals,[13] and is the largest federal entitlement program next to the Social Security income

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and chiropractors practicing within the scope of their license (Social Security Act § 1861(r), 42 U.S.C. § 1395x(r) (1982 ed., Supp. II)) -- certify that services provided to Medicare beneficiaries are reasonable and necessary for the treatment of illness. Social Security Act §§ 1814(a) and 1835(a), 42 U.S.C. §§ 1395g(a) and 1395(a) (1982 ed., Supp. II).

[10] See American Hospital Association, An Analysis of the Revised Medical Staff Standards of the Joint Commission on the Accreditation of Hospitals (March 1984).

[11] See, e.g., Joint Commission for the Accreditation of Hospitals, Accreditation Manual for Hospitals (1984).

The JCAH is a private accrediting body whose members are selected, for the most part, by the hospital industry and medical profession. A hospital that is accredited by the JCAH will be deemed to be in compliance with Medicare's conditions of participation for hospitals and eligible to provide hospital services to Medicare beneficiaries. Social Security Act § 1865, 42 U.S.C. § 1395bb (1982 ed., Supp. II); 51 Fed. Reg. 22,010 (June 17, 1986). See generally Jost, The Joint Commission on Accreditation of Hospitals: Private Regulations of Health Care in the Public Interest, 24 B.C.L. Rev. 835 (1983).

[12] In 1984, the JCAH loosened the medical staff standards which delineated what health care professionals can serve on the medical staff of a hospital and have privileges to admit and treat patients in a hospital by authorizing medical staff membership and admitting privileges for some non-physician health care professionals within the scope of their license but with appropriate supervision by physicians. See Joint Commission for the Accreditation of Hospitals, Accreditation Manual for Hospitals, at 89-95. See American Hospital Association, An Analysis of the Revised Medical Staff Standards of the Joint Commission on Accreditation of Hospitals, supra note 12.

[13] Levits, Lazenby, Waldo & Davidoff, National Health Expenditures, 1984, Health Care Fin. Rev., Fall 1985, at 23 [hereafter cited as "National Health Expenditures, 1984"].

maintenance program for the aged and disabled.[14] It comprised an estimated 7% of the federal budget for FY 1986.[15] Over 70% of Medicare expenditures in 1984 were for hospital services under Part A and 23% were for physician and other outpatient services under Part B.[16] Medicare is the largest single payer for hospital services in the nation and, in 1984, paid 28% of the nation's total bill for hospital care.[17] Approximately 36% of the revenue of the 5,800 community hospitals serving Medicare beneficiaries comes from the Medicare program, resulting in hospitals' heavy reliance on this program for financial stability.[18] Medicare is also the largest purchaser of physician and other outpatient services and, in 1984, paid approximately 25% of the nation's bill for these services.[19]

1. Administration

The Health Care Financing Administration (HCFA) within the Department of Health and Human Services (HHS) administers the Medicare program. Before 1980, HHS was the Department of Health, Education and Welfare (HEW). Initially, the Social Security Administration (SSA) administered the Medicare program. In 1977, the Carter administration created HCFA and consolidated the Medicare and Medicaid programs into this agency.[20]

HCFA contracts with private organizations to administer the claims of beneficiaries and the payment of providers under the Medicare program.[21] For Part A, these organizations are called "fiscal intermediaries" and for Part B they are referred to as "carriers." Despite the name difference, these organizations perform essentially the same functions of administering claims for coverage and payment. Congress adopted this unique approach for program administration because Blue Cross and Blue Shield plans and other insurance companies had the requisite expertise for administering complex health insurance programs and also because of pressures from the hospital industry for an arrangement which allowed hospitals to deal with familar Blue Cross plans and insurance companies rather than the federal government.[22]

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[14] Executive Office of the President, Office of Management and Budget, Budget of the United States, FY 1987 (1986) [hereinafter cited as "Budget of the United States, FY 1987"].

[15] Id. at M-4 & 5-109. This figure was derived by dividing estimated Medicare budget outlays for FY 1986 by total federal budget outlays for FY 1986.

[16] National Health Expenditures, 1984 at 23.

[17] Id. at 20; Budget of the United States, FY 1987 at 5-108.

[18] J. Schwartz and J. Martin, Hospital Involvement With Medicare and Medicaid: A Statistical Profile 1 (1983) (American Hospital Association, Office of Public Policy Analysis).

[19] Budget of the United States, FY 1987 at 5-108.

[20] 42 Fed. Reg. 13,262 (1977).

[21] Social Security Act §§ 1816 and 1842, 42 U.S.C. §§ 1395h and u (1982 ed., Supp. II).

The administration of the Medicare program is a mammoth job and includes determining the coverage and amount of payment for millions of claims of beneficiaries. In FY 1987, HCFA estimates that the Medicare program will process 366 million claims -- an increase of 33% over FY 1986.[23] HHS has requested $957 million for the administration of the Medicare program in its FY 1987 budget request of which $728 million is for essential claims processing services.[24] The determination of coverage and the payment for each claim is performed by the personnel of fiscal intermediaries, carriers and now also peer review organizations (PROs).[25] Congress delegated extraordinary adjudicative powers to these private organizations with respect to resolving appeals over coverage and payment issues arising under Part A and Part B of the Medicare program.

To provide the requisite guidance to fiscal intermediaries, carriers and PROs as well as to hospitals and other institutional providers, HCFA uses a massive compendium of multi-volume health insurance manuals for each of the organizations and providers involved in the administration and provision of health care benefits to Medicare beneficiaries.[26] In addition, HCFA publishes a special manual listing what technologies, procedures and services HHS includes as covered bebefits under the Medicare program.[27] These manuals and other program directives are interpretative and not promulgated pursuant to the informal rulemaking requirements of the Administrative Procedure Act.[28] As of September 1981, HCFA publishes rulings not previously published in the Federal Register to clarify points of statutory and regulatory interpretation over which questions arise.[29] HCFA has not issued rulings often. Indeed, HCFA has issued only about twelve rulings since 1981.

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[22] See S. Law, Blue Cross - What Went Wrong?, 31-50 (2d. ed. 1976). H.R. Rep. No. 213, 89th Cong., 1st Sess., 45-47 (1965); S. Rep. No. 404, 89th Cong., 1st Sess., 52-54 (1965).

[23] Department of Health and Human Services, HHS Fiscal Year 1987 Budget Request (Feb. 5, 1986) [hereinafter cited as "HHS Fiscal Year 1987 Budget Request"].

[24] Id.

[25] Peer Review Organizations are physician - dominated organizations responsible for determining whether certain benefits provided to Medicare beneficiaries are medically necessary and provided in an appropriate setting. See notes 120-130 infra and accompanying text.

[26] These health insurance manuals include the following: Group Practice Prepayment Plan Manual (HIM-8); Hospital Manual (HIM-10); Home Health Agency Manual (HIM-11); Skilled Nursing Facility Manual (HIM-12); Medicare Intermediaries Manual (HIM-13); Medicare Carriers Manual (HIM-14); Provider Reimbursement Manual (HIM-15); Medicare Renal Dialysis Facility Manual (HIM-29); and PRO Manual. HCFA constantly updates these manuals through "transmittals." For directives without ongoing effect, HCFA uses program memoranda. The Program Memoranda series went into effect March 1985 and include: Program Memoranda:

2. Eligibility

All individuals who are eligible for Social Security old age and disability insurance programs are eligible for Part A and Part B of the Medicare program.[30] Eligibility for these programs is also extended to nearly all other elderly not covered by the Social Security program[31] and certain other individuals with End

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Intermediaries; Program Memoranda: Carriers; Program Memoranda: Intermediaries/Carriers. These series replace the former series of program directives called Intermediary Letters. 1 Medicare & Medicaid Guide (CCH), at 523. There is also a comparable series for Peer Review Organizations.

HCFA gives each fiscal intermediary and carrier copies of these health insurance manuals and distributes manuals to providers and other organizations as needed for their work. However, HCFA does not make these manuals generally available to the public or even to providers because of their size, cost and need to be updated constantly. 42 C.F.R § 401.112 (1986). Portions of these manuals that affect the public are distributed to local Social Security Administration offices (id. at § 401.130-.132), although beneficiary advocacy groups maintain that such distribution does not always occur in practice.

[27] Health Care Financing Administration, Medicare Coverage Issues Manual HCFA-Pub. 6 reprinted in, 4 Medicare & Medicaid Guide (CCH), ¶ 27,201-27,221.

[28] 5 U.S.C. § 553 (1982 ed., Supp. II).

[29] 42 C.F.R. § 401.108 (1986).

[30] Social Security Act §§ 1811 and 1836, 42 U.S.C. § 1395c and o (1982 ed., Supp II).

[31] Social Secuirty Act §§ 1818 and 1836, 42 U.S.C. § 1395i-2 and o (1982 ed., Supp. II).

Stage Renal Disease.[32] Enrollment in both Part A and Part B of the Medicare program is voluntary.[33] There is no cost to enroll in Part A;[34] however, to enroll in Part B, the eligible individual must pay monthly premiums.[35] About 97% of all eligible individuals enroll in Part B.[36]

3. Benefits

Part A. The benefits under the hospital insurance component, Part A, include 90 days of basic hospitalization for each spell of illness.[37] There is no limit on the number of covered hospital admissions so long as there is only one admission in a single benefit period -- the time from admission until 60 days after discharge.[38] Part A also covers 100 days in a skilled nursing facility

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[32] Social Security Act § 1811, 42 U.S.C. § 1395c (1982 ed., Supp II).

[33] Social Security Act § 1803, 42 U.S.C. § 1395b (1982 ed., Supp. II).

[34] Social Security Act § 1811, 42 U.S.C. § 1395c (1982 ed., Supp. II).

[35] Social Security Act § 1839 and 1840, 42 U.S.C. §§ 13395r and 1395s (1982 ed., Supp. II).

State Medicaid programs may pay Part B premiums for the elderly who also receive Medicaid benefits. An estimated 85% of the Medicaid aged have Part B insurance purchased by state Medicaid programs. Twenty Years of Medicare and Medicaid at 29. Social Security Act § 1843; 42 U.S.C. § 1395v (1982 ed., Supp. II). Social Security Act §§ 1839 and 1840, 42 U.S.C. §§ 1395r and s (1982 ed., Supp. II).

[36] Twenty Years of Medicare and Medicaid at 14.

[37] Social Security Act § 1812, 42 U.S.C. § 1395d (1982 ed., Supp II); 42 C.F.R. § 409.10-.27 and .60-69 (1986).

[38] In any benefit period, a beneficiary is entitled to 60 fully paid days of hospital care, subject only the initial deductible amount. After 60 days, a beneficiary must pay a per diem coinsurance amount equal to one-fourth of the initial deductible. After 90 days, the per diem coinsurance amount doubles that of the amount for days 61 through 90. In addition, each day of hospital care in excess of 90 is subtracted from the beneficiary's 60 days of "lifetime reserve" which he may use only once. Social Security Act § 1813(a); 42 U.S.C. § 1395e(a) (1982 ed., Supp. II).

Covered benefits under Part A include nearly all services, except for luxuries, generally provided in a hospital stay, namely room and board in a semi-private room, nursing services, operating and recovery room costs, drugs and following a hospitalization,[39] unlimited home health agency visits if the beneficiary is confined to home,[40] and limited hospice services for the terminally ill.[41] For the hospital benefit, there is a a deductible amounting to the cost of the first day of the hospitalization and some coinsurance after the 60th day of a hospital stay.[42] There is also coinsurance for skilled nursing but not home health services.[43]

Part B. The benefits under the supplementary medical insurance component, Part B, include physicians' services and a wide variety of other medical services provided on an outpatient basis.[44] These include services provided in hospital outpatient departments and rural health clinics, outpatient surgery, diagnostic x-ray and laboratory services, rehabilitative services, physical, occupational and speech therapy and services of physicians' assistants and nurse practitioners ordered by a physician. Part B also offers some home health services not covered

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medical supplies furnished in the hospital, laboratory tests, radiological services billed by the hospital, rehabilitation services, and blood. Social Security Act § 1861(b), 42 U.S.C. § 1395x(b) (1982 ed., Supp. II).

[39] Social Security Act § 1812(a)(2)(A), 42 U.S.C. § 1395d(a)(2)(A) (1982 ed., Supp. II); 42 C.F.R. § 409.30-.36 (1986).

[40] Social Security Act § 1861(m), 42 U.S.C. § 1395x(m) (1982 ed., Supp. II).

Home health services include: part-time or intermittent nursing care provided by or under the supervision of a registered professional nurse; physical, occupational, or speech therapy; some medical supplies and durable medical equipment; and other items and services. To be eligible for home health services, the beneficiary must be "confined to home" and "in need of intermittent skilled nursing care." 42 C.F.R. § 409.42 (1986).

[41] Social Security Act § 1812(d), 42 U.S.C. § 1395d(d) (1982 ed., Supp. II).

[42] Social Security Act § 1813, 42 U.S.C. § 1395e (1982 ed., Supp. II). See note 40 supra.

[43] Social Security Act § 1813(a)(3), 42 U.S.C. § 1395e(a)(3) (1982 ed., Supp. II).

[44] Social Security Act § 1832, 42 U.S.C. § 1395k (1982 ed., Supp. II); 42 C.F.R. § 405.231 (1986).

under Part A.[45] Finally, an increasingly important and costly Part B benefit is the lease or purchase of durable medical equipment.[46] There is no limitation on the number of services provided under Part B.[47] Enrollees pay an annual deductible of $75.00 and pay 20% coinsurance on most covered services incurred during the year.[48]

It should be emphasized that physicians and suppliers of durable medical equipment under Part B are not required to accept Medicare payment as payment in full for their services.[49] Rather, they can bill Medicare patients directly for any amount they wish to charge and patients must then submit claims to the Medicare program for payment. A physician or supplier may accept assignment of a beneficiary's benefits but upon doing so relinquishes the right to bill the beneficiary for the difference between Medicare's payment and the full charge for the services.[50] As will be discussed below, physicians and suppliers, until recently, have had little incentive to accept assignment.[51] In 1985, because of payment reforms enacted by Congress.[52] approximately 68.1% of physicians accepted assignment which was a marked increase over past years.[53]

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[45] Although the home health services covered by Part A and Part B are identical, there is a slight difference between the two programs concerning the definition of "home health agency." Under Part B, but not Part A, the term includes any agency or organization which is primarily for the care and treatment of mental diseases. Social Security Act § 1861(o), 42 U.S.C. § 1395x(o) (1982 ed., Supp. II).

[46] Social Security Act § 1832, 42 U.S.C. § 1395k (1982 ed., Supp II); 42 C.F.R. § 405.231 (1986).

[47] Social Security Act § 1862(a)(1)(A), 42 U.S.C. 1395y(a)(1)(A) (1982 ed., Supp. II).

[48] Social Security Act § 1833(a),(b), 42 U.S.C. § 13952(a),(b) (1982 ed., Supp. II).

[49] Social Security Act § 1842(b)(3)(B)(1), U.S.C. § 1395u(b)(3)(B)(1) (1982 ed., Supp. II). See Staff of Special Senate Comm. on Aging, Medicare: Paying the Physician -- History, Issues, and Options, 98th Cong., 2d Sess. 3 (1984) (Comm. Print) [hereinafter cited as "Medicare: Paying the Physician"].

[50] Social Security Act § 1842(b)(3)(B)(ii), 42 U.S.C. § 1395u(b)(3)(B)(ii) (1982 ed., Supp. II).

[51] See notes 142-145 infra and accompanying text.

4. Coverage

An important concept in understanding Medicare benefits, and particularly the disputes over benefits that arise between beneficiaries, providers and the Medicare program, is coverage. In brief, coverage defines the type and amount of health care benefits that the Medicare program will pay for as well as the conditions that must be met for payment. HCFA, in consultation with a panel of HCFA physicians or the Public Health Service, and also, in some more minor cases, fiscal intermediaries and carriers, determines what new procedures and technologies will be covered Medicare benefits when the question arises.[54]

The Social Security Act also specifies certain types of services that are expressly excluded from coverage under the Medicare program.[55] For both Part A and Part B, such services include physicals, immunizations, eye glasses and hearing aids, personal comfort items and cosmetic surgery.[56] The two conditions for coverage are that services not be covered by another public insurance program[57] and that the services must be "reasonable and necessary" for the treatment of an illness.[58]

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[52] See notes 142 & 146 infra and accompanying text.

[53] Jencks & Dobson, Strategies for Reforming Medicare's Physician Payments-Physician Diagnosis-Related Groups and Other Approaches, 312 New Eng. J. of Med. 1492 (1985).

[54] See Banta, Ruby & Burns, Using Coverage Policy to Contain Medicare Costs and Rating, The Medicare Technology in House Comm. on Ways and Means, Proceedings of the Conference on the Future of Medicare, 98th Cong., 2d Sess. 129-148 (1984) (Comm. Print).

[55] Social Security Act § 1862, 42 U.S.C. § 1395y (1982 ed., Supp. II); 42 C.F.R. § 403.310 - .323 (1986). See Medicare Beneficiary Appeals Processes in Prospective Payment Assessment Commission, Technical Appendixes to the Report and Recommendations to the Secretary, U.S. Department of Health and Human Services, April 1, 1986, Appendix C, at 162, 165-66 [hereinafter cited as "Technical Appendixes to the ProPAC Report and Recommendations to the Secretary, April 1, 1986"].

[56] Social Security Act § 1862, 42 U.S.C. § 1395y (1982 ed., Supp. II); 42 C.F.R. § 405.310 -.323 (1986).

It is the condition that the services be reasonable and necessary for the treatment of an illness that generates most of the disputes over coverage and the bulk of appeals on coverage determinations under both Part A and Part B.[59] The determinations require a decision on the basis of medical criteria of whether the benefit was necessary and reasonable in a specific instance or provided in an appropriate setting. For hospital services under Part A, PROs make this determination.[60] Fiscal intermediaries make this determination for skilled nursing and home health services under Part A, and carriers make this determination for Part B services.[61] For Part A, another important condition for coverage of hospital and skilled nursing services is that the care not be "custodial."[62] Because of the inherent uncertainty of these types of coverage decisions, Congress has authorized the Secretary of HHS to waive a beneficiary's or provider's liability for any services not covered on the basis of medical criteria if the beneficiary or provider did not know or have reason to know that such services were not covered.[63]

5. Financing

Part A of the Medicare program is financed by the Hospital Insurance Trust Fund which is funded from the mandatory Social Security payroll tax on all wage earners.[64] Part B is financed by the Supplementary Medicare Insurance Trust Fund which is funded from premiums of enrollees and congressional appropriations.[65] Premiums comprise only about 25% of the Part B trust fund; the remaining 75% comes from appropriations.[66]

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[57] Social Security Act § 1862(a)(2) and (3), 42 U.S.C. § 1395y(a)(2) and (3) (1982 ed., Supp. II); 42 C.F.R. § 405.322-.325 (1986).

[58] Social Security Act § 1862(a)(1), 42 U.S.C. § 1395y(a)(1) (1982 ed., Supp. II); 42 C.F.R. § 405.310 (1986).

[59] Social Security Act § 1862(a)(1), 42 U.S.C. § 1395y(a)(1) (1982 ed., Supp. II). Medicare Beneficiary Appeals Provisions in Technical Appendixes to the ProPAC Report and Recommendations to the Secretary, April 1, 1986, Appendix C, at 165-66.

[60] See notes 237-239 *infra* and accompanying text.

[61] See notes 235 & 303 *infra* and accompanying text.

[62] Social Security Act § 1862(a)(9), 42 U.S.C. § 1395y(a)(9) (1982 ed., Supp. II); Medicare Beneficiary Appeals Processes in Technical Appendixes to the ProPAC Report and Recommendations to the Secretary, April 1, 1986, Appendix C, at 165.

[63] Social Security Act § 1879, 42 U.S.C. § 1395pp (1982 ed., Supp. II). *See* notes 227-231, 323 *infra* and accompanying text.

6. Payment Methods

It is important to appreciate that Congress initially gave hospitals and physicians almost complete autonomy to structure the method and level of payment under the Medicare and Medicaid programs. Former HEW Secretary Wilbur Cohen, a chief architect of the Medicare program, observed: "The ideological and political issues were so dominating that they precluded consideration of issues such as reimbursement alternatives and efficiency options."[67] Indeed, the only constraints the Social Security Amendments of 1965 imposed on hospitals and physicians in setting their payment levels under the Medicare program was that the level be "reasonable" and the services provided be "necessary" for the treatment of illness.[68] However, Congress and federal policy makers have been gravely concerned about payment methodologies under the Medicare program since its inception for reasons discussed in Chapter II and have instituted major reforms in the payment methodologies for acute care hospitals under Part A and are now developing major reforms in the payment methodologies for services under Part B.

B. The Medicare Program's Accomplishments

The Medicare program's accomplishments have been substantial and this entitlement program, although costly, has clearly been a success. Between 1967 and 1983, there was an increase in the utilization of hospital, home health and physicians' services by Medicare beneficiaries.[69] Medicare has had a remarkable impact on improving the health status of the elderly as evidenced by a two and one-half year increase in life expectancy among the aged since 1965 and drops of

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[64] Social Security Act § 1817, 42 U.S.C. § 1395i (1982 ed., Supp. II).

[65] Social Secuirty Act § 1841, 42 U.S.C. § 1395t (1982 ed. Supp. II).

[66] National Health Expenditures 1984 at 23, Table 9.

[67] Cohen, *supra* note 6 at 5.

[68] Social Security Act §§ 1815, 1833 and 1862(a)(1), 42 U.S.C. §§ 1395g, l and y(a)(1) (1982 ed., Supp. II).

[69] Twenty Years of Medicare and Medicaid at 35-41.

30% or more in the age adjusted death rates for diseases such as heart disease, stroke, diabetes and pneumonia that afflict the elderly.[70]

However, the performance of the Medicare program has been seriously deficient with respect to its cost, the dimensions of which will be discussed further below. But one particularly unfortunate aspect of this cost problem is its impact on beneficiaries. Because of deductibles and co-insurance for both Part A and Part B and the fact that physicians who do not accept assignment can bill patients directly for the difference between Medicare's payment and their full charge, Medicare beneficiaries are now responsible for 44% of their medical expenses and devote nearly the same proportion of their income to medical care as before the Medicare program.[71]

But perhaps the most serious ramification over the long term is the threatened financial solvency of both Part A and Part B of the Medicare program. Evidence suggests that if the Medicare program continues to provide benefits at its current levels and payment rates, the system may well be insolvent by the end of the century.[72] The specter of insolvency is real and must be kept in mind when evaluating the performance of HHS, HCFA and its fiscal intermediaries and carriers in administering the Medicare program and handling beneficiary and provider appeals.

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[70] What Medicaid and Medicare did - and Did Not - Achieve, Hospitals, Aug. 1, 1985, at 41-42 (interview with Karen Davis, Ph.D.).

[71] Aiken & Bays, Special Report: The Medicare Debate - Round One, 311 New Eng. J. of Med. 1190 (1981). See also House Select Comm. on Aging, Medicare After 15 Years: Has It Become a Broken Promise to the Elderly?, 96th Cong., 2d Sess. (1980) (Comm. print).

On June 10, 1986, the House Ways and Means Committee held hearings on the problem of beneficiaries' costs associated with Part B physician services at which measures to correct this serious problem were proposed. See Out-of-Pocket Costs for Physician Services: Hearing Before the Subcomm. on Health of the House Comm. on Ways and Means 99th Cong., 2d Sess. (1986).

[72] See Ginsberg & Moon, An Introduction to the Medicare Financing Problem in House Comm. on Ways and Means, Proceedings of the Conference on the Future of Medicare, 98th Cong., 2d Sess. 1 (1984) (Comm. Print). See also Svahn & Ross, Social Security Amendments of 1983: Legislative History and Summary of Provisions, Social Security Bull., July 1983, at 3 Mussey, Actuarial Status of the HI and SMI Trust Funds, Social Security Bull., June 1985, at 32.

CHAPTER II: THE COST CRISIS AND SEARCH FOR SOLUTIONS

A. The Crisis

Congress and HEW recognized almost immediately that the costs of the Medicare program would greatly exceed initial projections.[73] These predictions proved correct and, over the following years, total Medicare expenditures rose from $4.6 billion in 1967 to $62.9 billion in 1985.[74] During this period, Part A expenditures rose from $3.4 billion to $43.3 billion and Part B expenditures rose from $1.2 billion to $19.7 billion.[75] The most serious problem, because of its relative size and severe inflation rate, was escalating hospital costs. As noted above, expenditures for hospital services constitute about 70% of all Medicare expenditures[76] and, between 1967 and 1983, rose at an annual compound rate of 17.2%.[77] During this period, physician services, the second largest component of Medicare expenditures, constituting 23% of Medicare expenditures,[78] rose at an annual compound rate of 17.4%.[79] The annual compound growth rate for skilled nursing facilities services rose only 2.8% while the rate for home health services rose 24.1%.[80]

1. Initial Payment Methodologies

As noted above, the initial payment methodologies for health care institutions under Part A and for services of physicians and suppliers under Part B were quite favorable to providers and were based on methodologies that conformed closely to provider billing and accounting practices. Until the Social Security Amendments of 1983, Medicare paid all Part A providers the reasonable cost of covered services.[81] Congress delegated the definition of "reasonable cost" and the methodology for its determination to the Secretary of HEW to develop through regulations.[82] A provider under Part A had to and still must accept Medicare payment as payment in full for a beneficiary's hospital stay and cannot charge the beneficiary any additional sums for covered benefits even if the institution's costs of providing the services exceeded Medicare's payment for those services.[83]

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[73] Reimbursement Guidelines for Medicare: Hearing Before the Senate Comm. on Finance, 89th Cong., 2d Sess. (1966); Staff of Senate Comm. on Finance, Medicare and Medicaid: Problems, Issues, and Alternatives, 91st Cong., 1st Sess. 53, 140-43 (Comm. Print 1970).

[74] Twenty Years of Medicare and Medicaid at 42.

[75] Id. at 43.

[76] See note 18 supra and accompanying text.

[77] Twenty Years of Medicare and Medicaid at 43.

[78] See note 18 supra and accompanying text.

[79] Twenty Years of Medicare and Medicaid at 43.

[80] Id.

Payments to physicians under Part B have always been based on the physician's charges but were limited to the physician's customary charge for the same or similar services, the maximum prevailing charge for that service of all physicians in the area or the physician's actual charge.[84] Under its basic payment methodology for physicians' services, Medicare pays physicians 80% of the reasonable charge for all covered services provided.[85] The reasonable charge for a specific service in most cases is calculated as the lowest of the physician's customary charge for the service, the prevailing charge for the service in that area or the physician's actual charge.[86] Each July, carriers update the customary charge of each individual physician and also the prevailing charge of all physicians with comparable qualifications in the carrier's service area.[87] Unlike Part A, physicians and suppliers paid under Part B are not required to accept Medicare payment as payment in full on any benefit claim unless they accept the claim from the beneficiary.[88]

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[81] Social Security Amendments of 1965 § 102(a), codified as amended in, Social Security Act §§ 1861(v) and 1871, 42 U.S.C. §§ 1395x(v) and 1395hh (1982 ed., Supp. II).

Under the retrospective cost reimbursement system, Medicare reimbursed direct costs, such as room, board and nursing care, that are directly related to patient care and generally pertain to services for which charges can be made. Medicare also paid indirect costs, i.e., those not directly attributable to patient care but incurred in the operation and administration of a hospital. Included among indirect costs are the major capital cost of providers; i.e., depreciation on a provider's plant buildings and equipment; interest on capital debt, lease expenses for capital assets, and, for proprietary providers only, a reasonable return on equity capital. Social Security Act § 1861(v), 42 U.S.C. § 1395x(v) (1982 ed., Supp. II); 42 C.F.R. §§ 405.402-.482 (1986).

[82] Social Security Act § 1861(v); 42 U.S.C. § 1395x(v) (1982 ed., Supp. II).

[83] Social Security Act § 1866(a)(1), 42 U.S.C. § 1395cc(a)(1) (1982 ed., Supp II).

[84] Social Security Amendments of 1965, § 102(a), codified as amended in, Social Security Act § 1842(b)(3)(F), 42 U.S.C. § 1395u(b)(3)(F) (1982 ed., Supp. II). See Medicare: Paying the Physician at 20.

[85] Social Security Act §§ 1833(a)(1), 42 U.S.C. § 1395l(a)(1) (1982 ed., Supp. II); 42 C.F.R. §§ 405.501-515. (1986).

[86] Social Security Act § 1842(b)(3)(F), 42 U.S.C. § 1395u(b)(3)(F) (1982 ed., Supp. II); 42 C.F.R. § 405.502(f)(5) (1986).

2. Ramifications of Early Payment Methodologies

The cost problem has plagued Congress and HHS policy makers since the inception of the Medicare program and has dominated the health policy debate during this time. Early in the program, a consensus emerged among federal policy makers, Congress and other observers that cost reimbursement was a fundamental cause of the inflation in Medicare hospital expenditures.[89] The theory was simply that since hospitals could be assured of payment for all the reasonable costs of covered services, they were rewarded for providing more services at higher cost. While lucrative for hospitals, these incentives translated into increasingly greater costs for the Medicare program and resulting pressure on administrations of both political parties, Congress and the hospital industry to find ways to reduce the rate of increase in Medicare hospital expenditures.[90] In 1983, as will be discussed below, Congress fundamentally changed the way in which Medicare pays hospitals for services provided to Medicare beneficiaries in the new prospective payment system.[91]

Physicians, likewise, had comparable incentives to provide more services at greater cost to the Medicare program. This payment methodology also encourages physicians and suppliers to break down services into components for which a charge can be made in order to maximize reimbursement.[92] The Part B payment methodology, like the cost reimbursement system for hospitals and other health care institutions, has encouraged unwarranted growth in Medicare expenditures for Part B services and Congress and HHS are currently considering major reforms of Part B payment methodologies.[93]

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[87] Social Security Act §§ 1833(a)(2) and 1842(b)(3)(F), 42 U.S.C. § 1395f(a)(2) and § 1395u(b)(3)(F) (1982 ed., Supp. II); 42 C.F.R. § 405.503 (1986).

[88] See notes 49-53 supra and accompanying text. Suppliers of durable medical equipment are paid according to metholodogies that are similar to payment of physicians. See Generally Medicare: Paying the Physician.

[89] See, e.g., M. Feldstein and A. Taylor, The Rapid Rise of Hospital Costs (1977); M. Zubkoff, I. Raskin & R. Hanft, Hospital Cost Containment (1978). A similar consensus emerged with respect to skilled nursing facility costs and Congress as well as HHS has inaugurated several cost containment strategies and reforms in the reimbursement of skilled nursing facilities over the years.

[90] 20 Years of Medicare and Medicaid, Health Care Fin. Rev. (1985 Annual Supp.) (comments of Senator Dave Durenberger, Congressman Dan Rostenkowski, J. Alexander McMahon, and Michael D. Bromberg).

[91] See notes 150-191 infra and accompanying text.

B. The Search for Solutions

To control these Medicare program expenditures, Congress by statute and HEW by regulation adopted numerous cost containment strategies and conducted several demonstration projects to explore ways to change Medicare payment methodologies to achieve cost savings. Most of these efforts were targeted at hospital costs because this is where policy makers perceived the greatest problem. Some measures were targeted at skilled nursing facilities and home health agencies as well, although these reforms are not addressed in this analysis. In recent years, policy makers and Congress have focused more attention on the cost of services under Part B.

1. Hospital Payment Reform

The Social Security Amendments of 1972. In the Social Security Amendments of 1972,[94] Congress adopted several regulatory measures to control hospital costs. The most important of these measures were in § 223 of the Social Security Amendments of 1972.[95] Section 223 provided that Medicare should not reimburse any costs that were unnecessary for the provision of patient care services, and the regulations under § 223 imposed a limit on routine inpatient costs.[96] With this limit, Congress and the Medicare program departed from recognizing all the costs of hospitals in providing care to Medicare beneficiaries and imposed regulatory controls on payments to hospitals to force hospitals to deliver services in a more cost effective manner.

The Social Security Amendments of 1972 also authorized the Secretary of HEW to withhold reimbursement for capital costs associated with a capital expenditure that a designated state health planning agency found was inconsistent with its own health planning criteria, standards and health plans.[97] The Social Security Amendments of 1983 required states to adopt such capital expenditure review programs under § 1122 of the Social Security Act, meeting certain criteria if Congress does not incorporate capital costs into the Medicare prospective payment system by 1986,[98] and Congress subsequently extended this deadline to FY 1987.[99] However, this provision has not been implemented and likely will not be since Congress or HHS will probably incorporate capital costs into the prospective payment system for FY 1987.[100]

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[92] Jencks & Dobson, supra note 53. See also, Medicare: Paying the Physician; Reform of Medicare Payments to Physicians: Hearing Before the Subcomm. on Health of the Senate Comm. on Finance, 99th Cong., 1st Sess. (1985) [hereinafter cited as "Senate Finance Comm. Hearings on Reform of Medicare Payments to Physicians"].

[93] See notes 142-149 infra and accompanying text.

[94] Social Security Amendments of 1972, Pub. L. No. 92-603, 86 Stat. 1329 (1972) [hereinafter cited as "Social Security Amendments of 1972"].

[95] Social Security Amendments of 1972 § 223, codified as amended in, Social Security Act § 1843x(v), 42 U.S.C. § 1395x(v) (1982 ed., Supp. II).

[96] 42 C.F.R. § 405.460 (1986).

On the assumption that excess and unnecessary utilization of hospital services by Medicare beneficiaries was a fundamental cause of escalating Medicare costs and that the required utilization review of hospitals for Medicare patients had been ineffective,[101] Congress authorized establishment of federally funded, private Professional Standards Review Organizations (PSROs) to conduct independent utilization and quality review of hospital services under the Medicare and Medicaid programs.[102] The concept was that physicians would review the quality and appropriateness of health care services that their peers provided to Medicare beneficiaries.

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[97] Social Security Amendments of 1972 § 221(a), codified as amended in, Social Security Act § 1122, 42 U.S.C. § 1320a-1 (1982 ed., Supp. II).

[98] Social Security Amendments of 1983, Pub. L. No. 98-21 Title VI, § 601(e), 97 Stat. 65, 162 (1983) [hereinafter cited as "Social Security Amendments of 1983"], codified as amended in, Social Security Act § 1886(g)(1), 42 U.S.C. § 1395ww(g)(1) (1982 ed., Supp. II).

[99] Urgent Supplemental Appropriations Act, 1986, Pub. L. No. 99-349, Title II, § 206 (1986), amending Social Security Act § 1886(a)(4) and (g)(i); 42 U.S.C. § 1395ww(a)(4) and (g)(1) (1982 ed., Supp. II).

[100] See notes 167-168 infra and accompanying text.

[101] Social Security Amendments of 1965, § 102(a), codified as amended in, Social Security Act § 1861(k), 42 U.S.C. § 1395x(k) (1982 ed., Supp. II).

As a condition of participation in the Medicare program, hospitals had to have a utilization review program to evaluate the medical necessity and appropriateness of hospital services provided Medicare beneficiaries. Id. Similar requirements were imposed on skilled nursing facilities. Id.

[102] Social Security Amendments of 1972 § 249F(b), codified as amended in, Social Security Act § 1151 et seq., repealed, Peer Review Improvement Act of 1982, Title I, Subtitle C of the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 143, 96 Stat. 324, 382 (1982) [hereinafter cited as "Tax Equity and Fiscal Responsibility Act of 1982]. See A. Gosfield, PSROs: The Law and the Health Consumer (1975).

The PSRO program had difficulties getting implemented and experienced equivocal success.[103] Physicians unsuccessfully challenged the program as a violation of the constitutional rights of physicians and their patients.[104] Ultimately federal policy makers and Congress questioned the effectiveness of the program in controlling costs.[105] In its early years, the Reagan administration sought to dismantle the program on grounds that it was excessively regulatory in addition to being ineffective.[106] Congress formally terminated the program-- while still embracing the concept of peer review as means to control utilization under the Medicare program -- when it repealed the 1972 PSRO legislation and enacted the Peer Review Improvement Act of 1982.[107]

Medicare Payment Demonstration Projects. Shortly after the Medicare program began, Congress authorized the Secretary of HEW to waive Medicare program requirements in order to conduct demonstrations of different payment methodologies.[108] In the Social Security Amendments of 1972, Congress expanded this demonstration authority to test prospective payment methodologies.[109] Over the next ten years Congress conducted several demonstrations in various states.[110] The hypothesis of these demonstrations was that retrospective cost reimbursement was inflationary as it contained incentives for hospitals to provide excessive services and that methodologies paying hospitals a predetermined price or requiring hospitals to stay within an overall limit or budget regardless of costs would provide the appropriate incentives for hospitals to contain costs.

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[103] PSRO Proposals: Hearing on S.1250, S.2142 Before the Subcomm. on Health of the Senate Comm. on Finance, 97th Cong., 2d Sess. (1982); Proposed Phaseout of PSRO's and Utilization Review Requirements: Hearing Before the Subcomm. on Health of the Senate Comm. on Finance, 97th Cong., 1st Sess. (1981); Professional Standards Review Organization (PSRO) Program: Hearing Before the Subcomm. in Oversight and the Subcomm. on Health of the House Comm. on Ways and Means, 97th Cong., 1st Sess. (1981).

[104] Association of American Physicians and Surgeons v. Weinberger, 395 F. Supp. 125 (N.D. Ill. 1975), aff'd sub. nom without opinion; Association of American Physicians and Surgeons v. Mathews, 423 U.S. 975 (1975). See generally Gosfield, Medical Necessity in Medicare and Medicaid: The Implications of Professional Standards Review Organizations, 51 Temp. L.Q. 229 (1978).

[105] See note 103 supra and 106 infra.

[106] PSRO Proposals: Hearing on S 1250, S 2142 Before the Subcomm. on Health of the Senate Comm. on Finance, 97th Cong., 2d Sess., 6-11 (1982) (statement of George Thompson); Executive Office of the President, Office of Management and Budget, FY 1982 Budget Revisions 70 (1981).

[107] Peer Review Improvement Act of 1982 of the Tax Equity and Fiscal Responsibility Act of 1982 §§ 141-150, amending Social Security Act §§ 1151-1163, 42 U.S.C. §§ 1320c-1--12 (1982 ed., Supp. II).

[108] Social Security Amendments of 1967, Pub. L. No. 90-248, § 402, 81 Stat. 821, 930 (1967).

[109] Social Security Amendments of 1972 § 222(a).

This hypothesis was borne out in these demonstrations and prospective payment systems for other third party payers besides Medicare.[111] Congress and states were so impressed with the results of these state prospective payment systems that Congress authorized states to establish these systems for Medicare and other payers on a nonexperimental basis in the Tax Equity and Fiscal Responsibility Act of 1982[112] and, in the Social Security Amendments of 1983, expressly allowed states to opt out of the Medicare prospective payment system and establish state prospective payment systems for all payers.[113]

The Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA). TEFRA instituted major reforms to address the cost problems of the Medicare program.[114] In TEFRA, Congress modified the per diem cost limit established under § 223 of the Social Security Amendments of 1972[115] to a limit on the costs allowed for each Medicare patient case.[116] This change to regulation on a per case rather than a per diem basis represented an important conceptual departure from previous cost containment strategies as well as an important step in moving hospitals toward a prospective payment system. Also, in TEFRA, Congress imposed a limit on the rate of increase in a hospital's routine operating costs.[117] Hospitals with cost increases exceeding their target rate of increase limits were penalized while hospitals that kept increases below their target rate received part of the realized savings.[118] Allowing hospitals to retain savings was likewise a radical departure from previous cost containment strategies. Congress conceived the TEFRA limits as the foundation for a future prospective payment system and, in TEFRA, directed HHS to prepare a legislative proposal for a prospective payment system on hospitals for consideration in the next session of Congress.[119]

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[110] See Health Care Financing Administration, The National Hospital Rate-Setting Study: A Comparative Review of Nine Prospective Rate-Setting Programs (Aug. 1980) (reporting on these demonstrations).

It should be noted that the DRG pricing concept was tested in the New Jersey prospective payment demonstration.

[111] See Biles, Schramm and Atkinson, Hospital Cost Containment Under State Rate-Setting Programs, 303 New Eng. J. of Med. 664 (1980); Cromwell and Hewes, Medicare Expenditures and Utilization under State Hospital Rate Setting, Health Care Fin. Rev., Fall 1985, at 97; Steinwald and Sloan, Regulatory Approaches to Hospital Cost Containment: A Synthesis of the Empirical Evidence in A New Approach to the Economics of Health Care (M. Olson, ed. 1981).

[112] Tax Equity and Fiscal Responsibility Act of 1982, § 101(a)(1), codified as amended in, Social Security Act § 1886(c), 42 U.S.C. § 1395ww(c) (1982 ed., Supp. II).

[113] Social Security Amendments of 1983 § 601(c)(1); codified as amended in, Social Security Act § 1886(c), 42 U.S.C. § 1395ww(c) (1982 ed., Supp. II). See American Hospital Association, How States Can Opt Out of the Federal Medicare DRG System: A Summary of Legal Issues (1983).

Currently, only Maryland and New Jersey have Medicare waivers to operate state all-payer prospective payment systems.

[114] Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324 (1982).

The Peer Review Improvement Act of 1982. As part of TEFRA, Congress enacted the Peer Review Improvement Act establishing a new peer review program to perform utilization and quality of review of hospital services provided to Medicare beneficiaries.[120] To conduct these review activities, Congress authorized the Secretary to contract with private, physician-controlled peer review organizations meeting certain characteristics[121] for each state or, where warranted, region of the country.[122] Specifically, licensed physicians with active admitting privileges in local hospitals must conduct and supervise PRO reviews; and, also, only physicians can make final determinations to deny payment for services provided Medicare beneficiaries.[123] As of November 1985, HCFA had contracted with 54 PROs for all states and territories.[124] Most PROs are former PSROs supported by the state medical association, and in three cases the state medical association is the PRO.[125]

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[115] See notes 94-96 supra and accompanying text.

[116] Tax Equity and Fiscal Responsibility Act of 1982 § 101(a)(1), codified as amended in, Social Security Act § 1886(a)-(b), 42 U.S.C. § 1395ww(a)-(b) (1982 ed., Supp. II).

[117] Tax Equity and Fiscal Responsibility Act of 1982 § 101(a)(1), codified as amended in, Social Security Act § 1886(a), 42 U.S.C. § 1395ww(a) (1982 ed., Supp. II).

[118] Tax Equity and Fiscal Responsibility Act of 1982 § 101(a)(1), codified as amended in, Social Security Act § 1886(b)(1), 42 U.S.C. § 1395ww(b)(1) (1982 ed., Supp. II).

[119] Tax Equity and Fiscal Responsibility Act § 101(b)(3), codified as amended in, Social Security Act § 1135(c), 42 U.S.C. § 1320b-5(c) (1982 ed., Supp. II).

This statutory directive also called for HHS to develop a legislative proposal for prospective payment of skilled nursing facilities. Id.

[120] Peer Review Improvement Act of 1982 of the Tax Equity and Fiscal Responsibility Act of 1982 §§ 141-150, codified as amended in, Social Security Act §§ 1151-1163, 42 U.S.C. 1320c-1--12 (1982 ed., Supp. II). See Dans, Weiner & Otter, Peer Review Organizations: Promises and Pitfalls, 31 New Eng. J.of Med. 1131 (1985); Gosfield, Hospital Utilization Control by PROs: A Guide Through the Maze, Healthspan, Feb. 1985, at 3; Grimaldi & Micheletti, Implementation of the Peer Review Organization Program, QRB, Nov. 1984, at 340.

The chief function of PROs is to ensure the medical necessity, quality, and appropriateness of hospital services provided to Medicare beneficiaries.[126] In addition, Congress accorded important new monitoring functions to PROs under the prospective payment system which will be described in greater detail below.[127] To accomplish these functions effectively, PROs have authority to deny Medicare payment for inappropriate or unnecessary services and to recommend that certain providers and physicians be excluded even permanently from the Medicare program because of their utilization patterns and practices.[128] Congress has accorded PROs a broader scope of review, more authority and greater flexibility than PSROs had enjoyed. To accomplish this flexibility, Congress authorized the Secretary to contract with PROs to perform agreed upon functions and meet agreed upon goals during a two year contract period.[129] By statute, the PRO contract must specify the negotiated objectives of the PRO against which its performance will be judged, require the PRO to perform statutorily mandated review activities and other functions, and state the Secretary's right to evaluate the quality and effectiveness of the PRO in discharging its contracted functions.[130]

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[121] To qualify as a PRO, an organization must be either a "physician-sponsored" or "physician-access" organization. Social Security Act § 1153(a)(1), 42 U.S.C. § 1320c-2(a)(1) (1982 ed., Supp. II); 42 C.F.R. § 462.101 (1986). A physician-sponsored organization is composed of a substantial number, i.e., 20% of the practicing physicians in the community. Id. at § 462.102(b) and (c). A physician-access organization may be a nonprofit or for-profit organization established to conduct peer review but must demonstrate that it uses physicians in its review functions. Id. at § 462.103. A PRO may not have any formal association with a medical facility. Social Security Act § 1153(b)(3), 42 U.S.C. § 1320c-2 (1982 ed., Supp. II).

[122] Social Security Act § 1153(a)(1), 42 U.S.C. § 1320c-2 (1982 ed., Supp. II); 49 Fed. Reg. 7,202, codified in 42 C.F.R. § 462.107 (1986). Congress also authorized designation of a "Super PRO" to evaluate the performance of PRO's. Social Security Act § 1153(d); 42 U.S.C. § 1320c-2 (1982 ed., Supp. II).

[123] Social Security Act § 1154(c), 42 U.S.C. 1320c-3 (1982 ed., Supp. II).

[124] Dans, Wiener and Otter, supra note 44, at 1132. Seven PRO's were located outside the states and territories for which they were responsible. Id.

[125] Id.

[126] Social Security Act § 1154(a)(1), 42 U.S.C. 1320c-3(a)(1) (1982 ed., Supp. II).

[127] See notes 193-197 infra and accompanying text.

HHS's implementation of the PRO program has been controversial. HCFA was very slow in getting the program started. These delays were a matter of considerable concern to Congress which endorsed the concept that only physician-controlled entities were qualified to make determinations about whether the medical criteria for coverage of hospital services has been met and whether hospitals were providing quality services to Medicare beneficiaries.[131] One chief reason for the controversy is that HCFA has relied on program directives and contract provisions to delineate the specific responsibilities of PROs under the PRO program.[132] The American Hospital Association successfully challenged this implementation method in American Hospital Association v. Bowen.[133] In this decision, discussed below, the United States District Court for the District of Columbia invalidated many of the program directives that HCFA used to implement the PRO program on grounds that were not promulgated as rules under the Administrative Procedure Act.[134]

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[128] Social Security Act § 1156(b)(1), 42 U.S.C. 1320c-5(b)(1) (1982 ed., Supp. II); 50 Fed. Reg. 15,335 (1985), codified in, 42 C.F.R. § 474.32 (1986).

[129] Social Security Act § 1153(b)(1), 42 U.S.C. § 1320c-2(b)(1) (1982 ed., Supp. II).

Under the PSRO program, the Secretary awarded grants to PSRO's, and PSRO functions and objectives were specified by statute and regulation. See A. Gosfield, *supra* note 26, at 9. Congress concluded that these characteristics of the PSRO program were partially responsible for the poor performance of PSRO's.

[130] Social Security Act § 1153(c), 42 U.S.C. § 1320c-2(c) (1982 ed., Supp. II).

[131] *See Peer Review Organizations: Hearings Before the Subcomm. on Health of the Senate Comm. on Finance*, 99th Cong., 1st Sess. 2 (1985) [hereinafter cited as "*Senate Finance Comm. Hearings on Peer Review Organizations*"]; *Implementation of PRO's for Medicare: Hearing Before the Subcomm. on Health of the Senate Comm. on Finance* 98th Cong., 2d Sess. 38-40 (1984) [hereinafter cited as "*Senate Finance Comm. Hearings on Implementation of PRO's for Medicare*"].

[132] *See* PRO Manual IM85-2 replacing PSRO Transmittal No. 107; PRO Manual IM85-3 replacing PSRO Transmittal No. 108; Medicare Hospital Manual Transmittal No. 367, § 287.4A; and Medicare Intermediary Manual transmittal No. 1079 § 3789c and No. 1102; PRO Directive No. 2; Request for Proposal (RFP No. HCFA-84-015, Feb. 29, 1984).

Congress has exhibited considerable dissatisfaction with the implementation of the PRO program. The Senate Finance Committee has held hearings on the program's implementation on two occasions.[135] In the Consolidated Omnibus Budget Reconciliation Act of 1985, Congress instituted several changes in the PRO program to increase the responsibilities of PROs to monitor the quality of hospital care for Medicare beneficiaries.[136] Still not satisfied with the performance of the PRO program, Congress is considering additional legislative reforms in the budget legislation for FY 1987 to improve PRO quality of care reviews and enhance protection for beneficiaries from PRO and hospital decisions regarding the need for continued hospital care.[137]

2. Physician Payment Reform

Congress and federal policy makers have given far less attention over the years to reforming physician reimbursement than to hospital reimbursement. In part, this is because Part B costs represented a lesser proportion of the total Medicare cost problem.[138] Another factor is that the medical profession is politically powerful and has resisted reforms in Part B. Since the inception of Medicare in 1965, Congress has adopted only a few cost containment measures for Part B and these measures tended to address special problems of certain groups of physicians. Specifically, major reforms of Part B before 1983 included limiting the rate of increase in the prevailing charge to an index which reflects inflation,[139] reforming payment methods for physicians in teaching hospitals,[140] and tightening up payment methods for hospital-based physicians -- i.e., anesthesiologists, pathologists and radiologists having contract arrangements with hospitals.[141]

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[133] No. 85-0311 (D.D.C. May 30, 1986).

[134] 5 U.S.C. § 553 (1983 ed., Supp. II). See notes 417-418 infra and accompanying text.

[135] See Senate Finance Comm. Hearings on Implementation of PRO's for Medicare; Senate Finance Comm. Hearings on Peer Review Organizations.

[136] Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, Title IX, §§ 9401-9406, 100 Stat. 82 (1986) [hereinafter cited as "Consolidated Omnibus Budget Reconciliation Act of 1985"] (codified as amended in scattered sections of the Social Security Act).

[137] See H.R. 5300, § 10241, 99th Cong., 2d Sess. (1986); S. 2706, §§ 631-633, 99th Cong., 2d Sess. (1986). See also H.R. Rep. No. 727, 99th Cong., 2d Sess. 457-460 (1986); S. Rep. No. 348, 99th Cong., 2d Sess. 146-148 (1986).

[138] See notes 78-79 supra and accompanying text.

The Deficit Reduction Act of 1984 (DEFRA). In DEFRA, Congress instituted the first major reform of physician reimbursement since the inception of the Medicare program. Conceived as basically an interim measure until more comprehensive reforms were enacted, Congress imposed a freeze on the charges of physicans and suppliers of durable medical equipment for a fifteen-month period commencing July 1, 1984, until September 1985.[142] The medical profession unsuccessfully challenged this freeze on constitutional grounds in American Medical Association v. Heckler.[143]

DEFRA also contained incentives for physicians to accept assignment and become "participating physicians" in the Medicare program. Specifically, those physicians and suppliers who voluntarily accept assignment for all Medicare patients are permitted to raise their charges for purposes of the future calculation of their customary charge during the freeze period whereas non-participating physicians and suppliers are not permitted to raise charges either in the present or for purposes of calculating future charges.[144] As a result of these incentives, the number of physicians becoming "participating physicians" was nearly 30% and assignments have increased dramatically.[145]

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[139] Social Security Amendments of 1972 § 224(a), codified as amended in, Social Security Act § 1842(b)(3)(F), 42 U.S.C. § 1395u(b)(3)(F) (1982 ed., Supp. II); 42 C.F.R. § 405.509 (1986).

[140] Social Security Amendments of 1972 § 227(b)(2), codified as amended in, Social Security Act § 1814, 42 U.S.C. § 1395f (1982 ed., Supp. II).

[141] Tax Equity and Fiscal Responsibility Act of 1982 § 108(a)(1), codified as amended in, Social Security § 1887, 42 U.S.C. § 1395xx (1982 ed., Supp. II); 42 C.F.R. §§ 405.550-.557 (1986).

[142] Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2306, Division B, Title III, 98 Stat. 494, 1070 (1984) [hereinafter cited as "Deficit Reduction Act of 1984"] amending, Social Security Act § 1842(b), 42 U.S.C. § 1395u(b) (1982 ed., Supp. II).

[143] 606 F. Supp. 1422 (S.D. Ind. 1985).

[144] Deficit Reduction Act of 1984 § 2306(c) amending, Social Security Act § 1842, 42 U.S.C. § 1395u (1982 ed., Supp. II).

The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA). In COBRA, Congress made additional changes in the Part B payment methodologies. The chief measures include extending the freeze of the charges of physicians and suppliers of durable medical equipment established in DEFRA until September 1986 and enhancing the incentives for physicians and suppliers to accept assignment and become "participating physicians."[146] Further, COBRA directed the Director of the Office of Technology Assessment (OTA) to appoint an eleven member Physician Payment Review Commission by May 1, 1986, to perform an analytical and evaluative function for physician payment comparable to the role of the Prospective Payment Assessment Commission under the prospective payment system for hospitals.[147]

Future Reforms. Congress and HHS have given greater attention to how to reform Part B payment methodologies in the last three years than ever before. In the Social Security Amendments of 1983, Congress directed the Secretary to study how to pay physicians according to a methodology using Diagnosis Related Groupings (DRG's).[148] This mandate has precipitated an examination of how Medicare pays physicians and other suppliers of services under Part B and has generated proposals for fundamental modification of Part B payment methodologies.[149] It is clear that Congress plans to enact legislation to reform Part B payment methods in the near future and that these payment methods will be fundamentally different from those Medicare uses currently.

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[145] Health Care Financing Administration, Medicare Participating Physician and Supplier Program: Fact Sheet (Jan. 1985). Similar results were seen for suppliers of durable medical equipment as well. Id.

[146] Consolidated Omnibus Budget Reconciliation Act of 1985, § 9301, amending, Social Security Act § 1842(b), 42 U.S.C. § 1395u(b) (1982 ed., Supp. II).

[147] Consolidated Omnibus Budget Reconciliation Act of 1985 § 9305, amending, Social Security Act § 1845, 42 U.S.C. § 1395x (1982 ed., Supp. II). This commission has been selected and is conducting its work.

[148] Social Security Amendments of 1983 § 603(a)(2)(B).

[149] See Senate Finance Comm. Hearings on Reform of Medicare Payments to Physicians, Medicare: Paying the Physician; Jencks & Dobson, supra note 53; Burney, Hickman, Paradise & Schieber, Medicare Physician Payment, Participation, and Reform, Health Affairs, Winter 1984, at 5; Fox, Physician Reimbursement Under Medicare: An Overview and a Proposal for Area-Wide Physician Incentives, and Hadley, Critique of Peter Fox's "Physician Reimbursement Under Medicare: An Overview and a Proposal for Area-Wide Physician Incentives, in House Comm. on Ways and Means, Proceedings of the Conference on the Future of Medicare, 98th Cong., 2d Sess. 108-128 (1984).

3. The Solution to the Hospital Cost Problem: The Prospective Payment System

As the solution to the problem of hospital costs, Congress enacted the prospective payment system in April 1983.[150] This system, which started October 1, 1983, fundamentally changed how Medicare pays acute care hospitals for services to Medicare beneficiaries.[151] Specifically, Congress discontinued paying hospitals the reasonable cost of covered services on a retrospective basis and began paying hospitals a prospectively determined price for each Medicare case.

The Rate Structure. The basic premise of the prospective payment system established under the Social Security Amendments of 1983 is that Medicare will pay hospitals a predetermined fixed price for each patient case regardless of the cost the hospital incurs in treating that patient. The theory is that this approach will reverse the incentives of the retrospective cost reimbursement system which encouraged hospitals to incur costs and thereby increase their Medicare reimbursement.[152] Under the prospective payment system, Medicare would establish the price for a patient case beforehand and hospitals can retain savings if they treat the patient for less than that price. Thus, hospitals have an incentive to use less resources and reduce costs in treating patients. Indeed, it is this change in incentives that Congress, the Administration and also hospitals sought to accomplish with the prospective payment, as HHS stated in its 1982 report to Congress on its proposal for the prospective payment system:[153]

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[150] Social Security Amendments of 1983 § 601(e), codified as amended in, Social Security Act § 1886(d) passim, 42 U.S.C. § 1395ww(d) passim (1982 ed., Supp. II).

[151] The prospective payment system applies only to acute care hospitals; rehabilitation, psychiatric and children's hospitals are not included in the prospective payment system nor are units in acute care hospitals that provide rehabilitative, psychiatric or pediatric services. Social Security Act § 1886(d)(1)(B); 42 U.S.C. § 1395ww(d)(1)(B) (1982 ed., Supp. II); 42 C.F.R. § 412.20-.32; (1986).

The Secretary is also authorized to make exceptions and adjustments under the prospective payment system for regional and national referral centers, sole community hospital, cancer hospitals and hospitals serving a disproportionate number of Medicare and low income patients. Social Security Act § 1886(d)(5)(C), 42 U.S.C. § 1395ww(d)(5)(C); 42 C.F.R. § 412.90-.104 (1986).

[152] See notes 89-90 supra and accompanying text.

[153] H.R. Rep. No. 25, 98th Cong., 1st Sess. 132 (1983); Secretary of the Department of Health and Human Services, Report to Congress on Hospital Prospective Payment for Medicare 101-110 (1982) [hereinafter cited as "HHS Report to Congress"]. See Hospital Prospective Payment System: Hearings Before the Subcomm. on Health of the Senate Comm. on Finance, 98th Cong., 1st Sess. (1983) [hereinafter cited as "Senate Finance Comm. Hearings on Hospital Prospective

> The ultimate objective of PPS is to set a reasonable price for a known product. This provides incentives for hospitals to produce the product more efficiently. When PPS is in place, health care providers will be confronted with strong, lasting incentives to restrain costs for the first time in Medicare history.[154]

The Social Security Amendments of 1983 provided that the Medicare program will base its prices for Medicare hospital cases on a comprehensive classification system comprised of 470 mutually exclusive categories called "Diagnosis Related Groupings" ("DRGs").[155] The basic premise of DRGs is that all human disease conditions can be classified according to disease system, length of stay, intensity of resources consumed, morbidity, and sex and that such categories reflect the average cost of providing hospital services to all patients with diseases that fall in a DRG.[156]

Payment System"]; Medicare Hospital Prospective Payment System: Hearings Before the Subcomm. on Health of the House Comm. on Ways and Means, 98th Cong., 1st Sess. (1983) [hereinafter cited as "House Ways and Means Comm. Hearings on Medicare Hospital Prospective Payment System"]; 20 Years of Medicare and Medicaid, Health Care Fin. Rev. (1985 Annual Supp.) (comments of J. Alexander McMahon and Congressman Dan Rostenkowski).

[154] HHS Report to the Congress at 3.

[155] Social Security Amendments of 1983, § 601(e), codified as amended in, Social Security Act § 1886(e), 42 U.S.C. § 1395ww(e) (1982 ed., Supp. II).

[156] This case classification system was developed at Yale University initially to describe the type of patients admitted to hospitals and, later, under contract with HCFA, to serve as a basis of a pricing system for hospital payment. This classification system is based on the International Classification of Diseases, Ninth Revision, Clinical Modification, developed by the World Health Organization. The system is comprised of 23 major diagnostic categories (MDC's), representing a broad clinical category based on body system involvement and disease etiology and differentiated from all other clinical categories. The MDC's are then broken down into DRG's according to principal diagnosis, secondary diagnosis, surgical procedures, age and sex. There are 470 mutually exclusive and comprehensive DRG's. A list of the DRG's is included in Appendix A. HCFA has assigned weighting factors to reflect the relative use of hospital resources for each of 467 DRG's. The remaining three DRG's are administrative categories to assign certain types of cases for special treatment by the fiscal intermediary, e.g., discharges with an operating room procedure unrelated to a given MDC or a diagnosis based on invalid data. Preamble to Interim Final Rule, 48 Fed. Reg. 39,752 (1983), at 39,760-761. See Prospective Payment Assessment Commission, Technical Appendixes to the Report and Recommendations to the Secretary, U.S. Department of Health and Human Services, April 1, 1985, Appendix A, at 14-17 [hereinafter cited as "Technical Appendixes to the ProPAC Report and

The Medicare price is determined by taking the product of an average price per case for all Medicare cases, called the "standardized amount"[157] and the weight of the DRG assigned to the particular patient's case, according to the following formula:

Standardized Amount X DRG Weight = Price per Case.[158]

However, if a particular case is a so-called "outlier" and greatly exceeds the cost and length of stay ordinarily required for a case in the DRG to which the case would be assigned, Medicare will pay more for that case than the DRG price.[159]

The calculation of the standardized amount is complicated. Through FY 1986, the standardized amount includes two components: (1) the individual hospital's average cost per Medicare case, i.e., the "hospital-specific" component;[160] and (2) the average cost per case for all urban and all rural hospitals, i.e., the

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Recommendations to the Secretary, April 1, 1985"]. *See also* Yale School of Organization and Management, Health Systems Management Group, *The New ICD-9-CM Diagnosis Related Groups (DRGs) Classification Scheme, Final Report* (1982).

[157] Social Security Act § 1886(d)(2)(D), 42 U.S.C. § 1395ww(d)(2)(D) (1982 ed., Supp. II).

[158] *Technical Appendixes to the ProPAC Report and Recommendations to the Secretary, April 1, 1985*, Appendix A, at 4.

[159] Social Security Act § 1886(d)(5)(A)(i), 42 U.S.C. § 1395ww(d)(5)(A)(i) (1982 ed., Supp. II); 42 C.F.R. § 412.80 (1986). See Preamble to Interim Final Rule, 48 Fed. Reg. at 39,778 (1983).

[160] The hospital-specific component is based on the hospital's costs as determined in its base year under the prospective payment system, i.e., FY 1982. Social Security Act §§ 1886(b)(3)(A) and 1886(d)(1), 42 U.S.C. §§ 1395ww(b)(3)(A) and 1395ww(d)(1) (1982 ed., Supp. II); 42 C.F.R. §§ 412.71-.73 (1986). See Preamble to Interim Final Rule, 48 Fed. Reg. at 39,772-775 (1983). It is standardized to remove the effect of the hospital's case mix and adjusted to account for inflation, outlier payments and a factor that will assure "budget neutrality" of the prospective payment system in FY 1984 and FY 1985. Social Security Act § 1886(d)(1)(A); 42 U.S.C. § 1395ww(d)(1)(A) (1982 ed., Supp. II); 42 C.F.R. § 412.73 (1986). See Preamble to Interim Final Rule, 45 Fed. Reg. at 39,772-775 (1983). See note 163 *infra* and accompanying text. During the transition period, the proportion of the hospital-specific component declined while the federal component increased. Social Security Act § 1886(d), 42 U.S.C. § 1395ww(d) (1982 ed., Supp. II); 42 C.F.R. § 412.70 (1986).

"federal" component.[161] However, in FY 1987, the next fiscal year, the standardized amount will be based only on the federal component and there will be one price per case for all urban hospitals and one price per case for all rural hospitals.[162]

The federal component is calculated according to a formula with five steps: (1) removing costs that are not included in the prospective payment rate; (2) updating for inflation and other changes that affect hospital performance; (3) "standardizing" the costs per case to remove costs attributable to explainable differences between hospitals, i.e., area wage rates, teaching status and case mix; (4) aggregating and averaging the standardized amount for all urban and all rural hospitals; and (5) making other adjustments required by law, e.g., the adjustments to assure budget neutrality[163] and reflect payments for outlier cases.[164] The final standardized amount is then divided into components reflecting labor and nonlabor costs and the labor component is adjusted to reflect the wage level for the area in which the individual hospital is located.[165]

Not all hospital costs are included in the DRG prices due to congressional uncertainty about how to estimate these costs fairly and account for the large variations in these costs among hospitals. Specifically, the costs excluded are capital costs at least until 1987.[166] The Secretary has just proposed incorporating capital costs into the DRG prices.[167] The budget legislation currently before the Congress also contains proposals for incorporating capital costs into the prospective payment rates.[168] In addition, direct costs of medical education are reimbursed separately.[169] The prospective payment system also pays an allowance for teaching activities calculated on the basis of the number of the hospital's interns and residents.[170]

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[161] During the transition period from FY 1984 to FY 1986, the federal component included a regional as well as national average with the proportion of the federal component based on the national average increasing over the years. Social Security Act § 1886(d)(2)(D), 42 U.S.C. § 1395ww(d)(2)(D) (1982 ed., Supp. II); See Preamble to Interim Final Rule, 48 Fed. Reg. at 39,766 (1983).

[162] Social Security Act § 1886(d)(1)(A)(iii), 42 U.S.C. § 1395ww(d)(1)(A)(iii) (1982 ed., Supp. II); 42 C.F.R. § 412.70 (1986).

[163] The "budget neutrality" adjustment is designed to comply with the statutory directive that the prospective payment system not pay hopsitals more in FY 1984 and FY 1985 than would have been paid under the retrospective cost reimbursement system and the TEFRA limits. Social Security Act § 1886(e)(1)(B); 42 U.S.C. § 1395ww(e)(1)(B) (1982 ed., Supp. II). The adjustment for outlier payments to individual hospitals is designed to account for payments for outlier cases and thus ensure that budget neutrality is maintained. Social Security Act §§ 1886(d)(2)(E) and (F) and (3)(B) and (C); 42 U.S.C. § 1395ww(d)(2)(E) and (F) and (3)(B) and (C) (1982 ed., Supp. II).

[164] Social Security Act § 1886(d)(2), 42 U.S.C. § 1395ww(d)(2) (1982 ed., Supp. II); 42 C.F.R. § 412.73 (1986). See Preamble to Interim Final Rule, 48 Fed. Reg. at 39,763-766 (1983); Technical Appendixes to the ProPAC Report and Recommendations to the Secretary, April, 1985, Appendix A, at 5.

[165] Social Security Act § 1886(d)(2)(H), 42 U.S.C. § 1395ww(d)(2)(H) (1982 ed., Supp. II); 42 C.F.R. § 412.63(g). See Preamble to Interim Final Rule, 48 Fed. Reg. at 39,767-768 (1983); Technical Appendixes to the ProPAC Report and Recommendations to the Secretary, April, 1985, Appendix A, at 7.

The fiscal intermediaries conduct the payment transaction under the prospective payment system. Specifically, the hospital's fiscal intermediary assigns the DRG to a particular case on the basis of information supplied on the uniform hospital bill that the hospital submits for that case. Using the hospital's standardized amount and multiplying it by the DRG weight, the fiscal intermediary sets the final price per case. At the end of the year, the fiscal intermediary tallies the total paid for all Medicare cases as well as the hospital's capital and educational costs to determine the amount of final payment for that fiscal year. Then the fiscal intermediary issues a notice of program reimbursement (NPR).

Updating Payment Rates. The Social Security Amendments of 1983 require that the Secretary update payments to hospitals under the prospective payment system annually through the informal rulemaking process.[171] Specifically, updating hospital payment rates involves (1) adjusting the standardized amount to reflect inflation, hospital productivity, new technology and other factors, and (2) readjusting the DRGs to reflect changes in resource consumption due to new technology and other factors.[172] In updating the standardized amount, the Secretary may not exceed inflation plus 0.25%[173] and must take into account changes in the hospital "market basket," i.e., the goods and services hospitals purchase to care for Medicare beneficiaries,[174] hospital productivity, technological and scientific advances, quality of health care and the "long term effectiveness" of the Medicare program.[175] The Secretary must adjust the DRG classification and weighting factors for FY 1986 and at least once every four years thereafter "to reflect changes in treatment patterns, technology and other factors which may change the relative use of hospital resources."[176] Updating hospital payment rates is a highly technical process involving sophisticated economic and statistical analysis and necessarily requires assumptions about the health care system and reliance on data that are, in many cases, ultimately based on intuitive professional judgments.

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[166] Social Security Act § 1886(a)(4)(C), 42 U.S.C. § 1395ww(a)(4)(C) (1982 ed., Supp. II). See Preamble to Interim Final Rule, 48 Fed. Reg. at 39,776 (1983).

Capital costs are reimbursed separately according to retroactive cost reimbursement principles. In the Social Security Amendments of 1983, Congress stated its intent to include capital costs in DRG prices by October 1986 and directed the Secretary to report to Congress by October 1984 on proposals for incorporating capital costs into DRG prices. Social Security Amendments of 1983 § 603(a)(1) (1983). See Department of Health and Human Services, Report to Congress, Hospital Capital Expenses: A Medicare Payment Strategy for the Future (1986).

[167] Interim Final Rule, 51 Fed. Reg. 19,970; 19,974-88 (1986). See also Report to Congress, Hospital Capital Expenses, supra note 166.

[168] See H.R. 5300, § 10203, 99th Cong., 2d Sess. (1986); S. 2706, § 602, 99th Cong., 2d Sess. (1986). See also H.R. Rep. No. 727, 99th Cong., 2d Sess. 428-430 (1986); S. Rep. No. 348, 99th Cong., 2d Sess. 139-140 (1986).

[169] Social Security Act § 1886 (a)(4), 42 U.S.C. § 1395ww (a)(4) (1982 ed., Supp. II). See Preamble to Interim Final Rule, 48 Fed. Reg. at 39,777 (1983).

[170] Social Security Act § 1886(d)(5)(B), 42 U.S.C. § 1395ww(d)(5)(B) (1982 ed., Supp. II); 42 C.F.R. § 405.421 (1986). See Preamble to Interim Final Rule, 48 Fed. Reg. at 39,778 (1983).

Congress was acutely aware of this character of the rate setting process and also of the fact that the initial payment rates were imprecise and would need modification as data on actual experience under the system was generated and, further, that HHS was under tremendous pressure to reduce Medicare budgetary expenditures.[177] Thus, Congress created the Prospective Payment Assessment Commission (ProPAC) to participate in the process of setting and updating the hospital payment rates in a substantive and public fashion.[178] This commission, composed of seventeen experts on health care appointed by the Director of the congressional Office of Technology Assessment (OTA),[179] must by statute include representatives of the medical profession, hospital industry, and health manufacturers as well as business, labor, health insurance programs and the elderly.[180] ProPAC has two statutory responsibilities: (1) to make annual recommendations to the Secretary on the appropriate percentage change in the Medicare payments for hospital services, i.e., the "update factor"; and (2) to make recommendations to the Secretary on necessary changes in the DRGs, including advisability of establishing new DRGs, modifying existing DRGs and changing the relative weights of the DRGs.[181]

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[171] Social Security Act § 1886(e)(5)(A), 42 U.S.C. § 1395ww(e)(5)(A) (1982 ed., Supp. II).

[172] The Social Security Amendments of 1983 § 601(e), codified as amended in, Social Security Act § 1886(d)(2)(B) and (3)(A), 42 U.S.C. § 1395(d)(2)(B) and (3)(A) (1982 ed., Supp. II).

[173] Social Security Act § 1886(d)(2)(B), 42 U.S.C. § 1395(d)(2)(B) (1982 ed., Supp. II).

Initially, the limit was inflation plus 1%, but Congress tightened this formula in the Deficit Reduction Act of 1984. Deficit Reduction Act of 1984 § 2310, amending, Social Security Act § 1886(b)(3)(B), 42 U.S.C. § 1395(b)(3)(B) (1982 ed., Supp. II).

[174] Social Security Act § 1886(b)(3)(B), 42 U.S.C. § 1395ww(b)(3)(B) (1982 ed., Supp. II). See Preamble to Interim Final Rule, 48 Fed. Reg. at 39,776 (1983).

[175] Social Security Act § 1886(d)(4)(D), 42 U.S.C. § 1395ww(d)(4)(D) (1982 ed., Supp. II). See Preamble to Interim Final Rule, 48 Fed. Reg. at 39,776 (1983).

[176] Social Security Act § 1886(d)(4)(C), 42 U.S.C. § 1395ww(d)(4)(C) (1982 ed., Supp. II). See Preamble to Interim Final Rule, 48 Fed. Reg. at 39,776 (1983).

To assure that ProPAC has the contemplated influence in setting hospital payment rates, Congress mandated a rather formal schedule of public communications between ProPAC and HHS on the annual updating of hospital payment rates. ProPAC submits (1) an April report to the Secretary on adjustments to the prospective payment system; (2) a February report to Congress on the prospective payment system and the American health care system; and (3) a November report to Congress on the Secretary's regulations updating hospital payment rates for the upcoming fiscal year.[182] must publish the proposed rule on updating hospital payment rates[183] and, in that rule, must include ProPAC's April recommendations.[184] ProPAC comments on these proposed rules in the regular comment process.[185] After publication of the final rule by September 1,[186] ProPAC reports to Congress analyzing the Secretary's updating of the payment rates in the final rule.[187]

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[177] See Senate Finance Comm. Hearings on Hospital Prospective Payment System; House Ways and Means Comm. Hearings on Hospital Prospective Payment System.

[178] Social Security Amendments of 1983 § 601(e), codified as amended in, Social Security Act § 1886(e)(2), 42 U.S.C. § 1395ww(e)(2) (1982 ed., Supp. II). See H.R. Rep. No. 911, 98th Cong., 2d Sess. 140 (1984).

[179] Social Security Act § 1886(e)(2) and (6), 42 U.S.C. § 1395ww(e)(2) and (6) (1982 ed., Supp. II).

[180] Social Security Act § 1886(e)(B), 42 U.S.C. § 1395ww(e)(2)(6)(B) (1982 ed., Supp. II).

[181] Social Security Act § 1886(e)(3) and (d)(4)(D), 42 U.S.C. § 1395ww(e)(3) and (d)(4)(D) (1982 ed., Supp. II). See Prospective Payment Assessment Commission, Report and Recommendations to the Secretary, U.S. Department of Health and Human Services, April 1, 1985, at 3 [hereinafter cited as "ProPAC Report and Recommendations to the Secretary, April 1, 1985"].

[182] Social Security Act § 1886(d)(4)(D) and (e)(3), 42 U.S.C. § 1395ww(d)(4)(D) and (e)(3) (1982 ed., Supp. II). See H.R. Rep. No. 911, 98th Cong., 1st Sess. 140 (1984); Technical Appendixes to the ProPAC Report and Recommendations to the Secretary, April 1, 1985, Appendix A, at 11.

To date, HHS has not adopted many of the recommendations of ProPAC on the methodology to use for updating hospital payment rates or recalibrating DRGs but, rather, has selected other methodologies which have resulted in lower payment rates.[188] There have been some areas of agreement. ProPAC recommended that the Secretary include capital costs in the DRG prices beginning in FY 1987, a recommendation that HHS has accepted in concept but not according to the same methodology as ProPAC proposed.[189] Congress has overridden HHS's recommendations for updating hospital payment rates for prior years.[190] The House Budget Committee has indicated a concern that Congress may again have to act to set the update factor for hospital payment rates under the prospective payment system.[191]

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[183] Social Security Act § 1886(e)(4) and (5)(A), U.S.C. § 1395ww(E)(4) and (5)(A) (1982 ed., Supp. II).

[184] Social Security Act § 1886(e)(5), 42 U.S.C. § 1395ww(e)(5) (1982 ed., Supp. II).

[185] Although not statutorily mandated, ProPAC has submitted comments in the informal rule making process. Propective Payment Assessment Commission, 1986 Adjustments to the Medicare Prospective Payment System: Report to the Congress, November 1985, at 45-64 (comments on Proposed Rule, 50 Fed. Reg. 24,366 (1985)) [hereinafter cited as "1986 Adjustments to the Medicare Prospective Payment System: ProPAC Report to the Congress, November 1985"]. See also letter from Stuart H. Altman, Ph.D., Chairman of the Prospective Payment Assessment Commission, to William L. Roper, M.D., Administrator of the Health Care Financing Administration (July 2, 1986) (comments of the Prospective Payment Assessment Commission on the Notice of Proposed Rulemaking of June 3, 1986, Concerning Fiscal Year 1987 Changes in the Inpatient Hospital Prospective Payment System).

[186] Social Security Act § 1886(e)(5)(B), 42 U.S.C. § 1395ww(e)(5)(B) (1982 ed., Supp. II).

[187] Social Security Act § 1886(d)(4)(D), 42 U.S.C. § 1395ww(d)(4)(D) (1982 ed., Supp. II). See 1986 Adjustments to the Medicare Propsective Payment System: ProPAC Report to the Congress, November 1985.

[188] Regarding the update of FY 1986 rates: see ProPAC Report and Recommendations to the Secretary, April 1, 1985; Preamble to Proposed Rule, 50 Fed. Reg. 24,366 (1985); 1986 Adjustments to the Medicare Prospective Payment System: Report to the Congress, November 1985. For the update of FY 1987 rates: see Prospective Payment Assessment Commission, Report and Recommendations to the Secretary, U.S. Department of Health and Human Services, April 1, 1986 [hereinafter cited as "ProPAC Report and Recommendations to the Secretary, April 1, 1986"]; Preamble to Proposed Rule, 51 Fed. Reg. 19,970 (1986).

Ensuring Quality of Care. In the Social Security Amendments of 1983, Congress gave PROs the responsibility of monitoring hospital performance under the prospective payment system and specifically charged PROs with reviewing and determining for payment purposes "the validity of diagnostic information provided by [a] hospital, the completeness, adequacy and quality of care provided, the appropriateness of admissions and discharges, and the appropriateness of care for which additional payments are sought."[192] Congress also accorded HHS authority to impose sanctions on hospitals that exhibit inappropriate admissions and discharge practices.[193]

As a condition of payment, a hospital must have an agreement with the designated PRO for its area that enables the PRO to conduct the requisite reviews.[194] Specifically, PROs review the admission and discharge patterns of hospitals, the use of certain procedures, admissions for certain types of treatment and all outlier cases for which hospitals seek additional payment.[195]

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[189] Preamble to Proposed Rule, 51 Fed. Reg. at 19,983-85 (1986). See ProPAC Report and Recommendations to the Secretary, April 1, 1986, at 5-6; 32-36; Technical Appendixes to the ProPAC Report and Recommendations to the Secretary, April 1, 1986, Appendix B, at 40-56.

[190] See Emergency Extension Act of 1985, Pub. L. No. 99-107, § 5, amending Social Security Act § 1886(b)(3)(B), 42 U.S.C. § 1395(b)(3)(B) (1982 ed., Supp. II); Consolidated Omnibus Budget Reconciliation Act of 1986 § 9101, amending Emergency Extension Act of 1985 § 5(c).

[191] See H.R. Rep. No. 727, 99th Cong., 2d Sess. 427 (1986).

[192] Social Security Amendments of 1983 § 602(f)(1) codified as amended in, Social Security Act § 1866(a)(1)(F); 42 U.S.C. § 1395cc(a)(1)(F) (1982 ed., Supp. II). See H.R. Rep. No. 47, 98th Cong., 1st Sess. 197 (1983).

[193] Social Security Act § 1886(f)(22); 42 U.S.C. §1395ww(f)(2) (1982 ed., Supp. II); 42 C.F.R. §§ 474.30-.58 (1986).

[194] Social Security Act § 1866(a)(1)(F), 42 U.S.C. § 1395cc(a)(1)(F) (1982 ed., Supp. II); 42 C.F.R. § 412.44 (1986).

[195] The review responsibilities of PRO's are outlined in the regulations, 42 C.F.R. § 412.44 (1986), and spelled out even more specifically in the scope of work of the request for proposal for PRO contracts and in the contracts themselves. See notes 129-130 supra and notes 410-416 infra and accompanying text.

A PRO must also review any cases in which a hospital advises a beneficiary that Medicare does not cover certain services and the hospital will accordingly charge the beneficiary for such services.[196] Congress has given considerable attention to the performance of PROs in conducting these reviews as well as made and considered changes in review requirements to improve reviews of the quality of hospital care.[197]

C. Ramifications for the American Health Care System and Medicare Appeals

The prospective payment system has had an enormous impact on the American health care system and also the Medicare appeals system. First and very important is the fact that hospitals have done very well under the prospective payment system. Indeed, in 1984, the hospital industry made record profits -- an increase of 27.6% from 1983.[198] These profits have been so great that Congress and the HHS Inspector General have launched inquiries and have made recommendations for changes.[199] In addition, the prospective payment system has been quite successful in addressing the hospital cost problem and in curbing the rate of inflation in hospital costs. In 1984, the growth in hospital spending was the slowest in 19 years; and the 1984 Medicare inflation rate for hospital costs was 9.6% compared to the average annual rate of 16.7% between 1977 and 1983.[200] This record profitability for the hospital industry as well as the demonstrated success of the prospective payment system in meeting its goals is critically important to keep in mind when evaluating the appeals issues that hospitals have raised.

The prospective payment system and other regulatory changes have also had a critical impact on the American health care system. In 1984, the number of hospital admissions of the elderly declined for the first time since 1965, average length of stay continued to decline, and data suggest that hospitals were taking care of a sicker group of patients than ever before.[201] Implementation of the prospective payment system has encouraged hospitals and physicians to treat more Medicare beneficiaries outside the hospital, and data show that there was greater utilization of outpatient services in 1984 compared to earlier years.[202] Many patients are discharged from hospitals sicker and are in greater need of skilled nursing and home health services after discharge.[203] There has been increased utilization of Part B services, and these Part B services are more sophisticated and consequently more expensive than in previous years.[204]

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[196] 42 C.F.R. § 412.44 (1986).

[197] See notes 135-137 supra and accompanying text.

[198] National Health Expenditures, 1984 at 13. See also Prospective Payment Assessment Commission, Medicare Prospective Payment and the American Health Care System: Report to the Congress, 51 (1986) [hereinafter cited as "ProPAC Report on the American Health Care System"].

[199] Office of the Inspector General, Department of Health and Human Services, Financial Impact of the Prospective Payment System on Medicare Participating Hospitals-1984; Hospital Profits Under PPS: Hearing Before the Subcomm. on Health of the Senate Finance Comm., 99th Cong., 2d Sess. (1986).

[200] ProPAC Report on American Health Care System at 19-20; See also National Health Expenditures, 1984.

With these changes in the utilization patterns for health care resources has come an increased number of appeals about disputes over coverage and payment on home health services.[205] There has also been an increase in the number of appeals of Part B coverage and payment determinations as well as the amount of money involved in Part B appeals.[206] Specifically, there was a 31% increase in request for review determinations for Part B claims between 1983 and 1984 -- the first year of the prospective payment system.[207]

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[201] ProPAC Report on American Health Care System, at 19-20. See also Quality of Care Under Medicare's Prospective Payment System: Hearings Before the Senate Special Comm. on Aging, 99th Cong., 1st Sess. (1985) [hereinafter cited as "Senate Special Comm. on Aging Hearings on Quality of Care Under Medicare's Prospective Payment System"].

[202] Id.; Government Accounting Office, Information Requirements for Evaluating the Impacts of Medicare Prospective Payment on Post-Hospital Long-Term-Care Services: Preliminary Report (PEMD-85-8, Feb. 21, 1985).

[203] ProPAC Report on the American Health Care System at 60-61; Government Accounting Office, Information Requirements for Evaluating the Impacts of Medicare Prospective Payment on Post-Hospital Long-Term-Care Services: Preliminary Report (PEMD-85-8, Feb. 21, 1985); Senate Special Comm. on Aging, Hearings on Quality of Care Under Medicare's Prospective Payment System, at 118.

[204] See Congressional Research Service, Medicare Appeals Background Paper (Oct. 1985), reprinted in, Medicare Appeals Provisions: Hearings on S. 1158 [sic] Before the Subcomm. on Health of the Senate Comm. on Finance, 99th Cong., 1st Sess. 2 (1985) [hereinafter cited as "Senate Finance Comm. Hearings on Medicare Appeals Provisions"].

[205] Id.

[206] Id.

[207] Id.

CHAPTER III: THE MEDICARE APPEALS SYSTEM

The Medicare appeals system can best be characterized as a patchwork[208] -- with a large number of independent appeal processes to address a multitude of diverse issues. This diversity is in large part due to the fact that Medicare is an enormous program serving 30 million beneficiaries spread throughout the United States and its territories as well as a decentralized program with numerous public and private organizations -- i.e., HCFA, fiscal intermediaries, carriers, PROs, hospitals and other institutions and physicians -- executing various administrative and service responsibilities under the program. This report is concerned only with the appeals processes that are available for Medicare beneficiaries and providers to appeal disputes over coverage of and payment for Medicare benefits. Consequently, this chapter describes only these appeals processes.

A. Historical Development of the Medicare Appeals System

1. The Original Appeals System.

In designing the Medicare program in 1965, Congress determined that administrative review by HEW and judicial review would only be accorded to beneficiaries having disputes as to entitlement to benefits or the amount of benefits under Part A over a certain sum.[209] The Medicare statute provided further that § 205(b)[210] and § 205(g)[211] of the Social Security Act, which governed administrative and judicial review for other appeals under the Social Security Act, would apply to these Medicare appeals.[212]

Congress did not authorize comparable administrative or judicial review for provider payment disputes under Part A nor offer any rationale for this decision in the legislative history. Pursuant to § 1872 of the Social Security Act, § 205(h) applied to provider appeals.[213] Thus, in the early years of the Medicare program, fiscal intermediaries heard all appeals of provider payment disputes and no subsequent review by the Secretary of HEW or the federal courts was available.

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[208] Medicare Beneficiary Appeals Process in Technical Appendixes to the ProPAC Report and Recommendations to the Secretary, April 5, 1986, Appendix C, at 163.

[209] Social Security Amendments of 1965, § 102(a), codified as amended in, Social Security Act § 1869(b), 42 U.S.C. § 1395ff(b) (1982 ed., Supp. II). The House bill proposed an amount in controversy for administrative and judicial review of $1,000 while the Senate amendment proposed a $100 threshold. The conference committee determined to allow administrative appeals for amounts in controversy exceeding $100 and judicial review for amounts of $1,000 and above. H.R. Rep. No. 682, 89th Cong., 2d Sess. 46 (1966).

[210] Social Security Act § 205(b), 42 U.S.C. § 405(b) (1982 ed., Supp. II).

[211] Social Security Act § 205(g), 42 U.S.C. § 405(g) (1982 ed., Supp. II).

[212] Social Security Amendments of 1965, § 102(a), codified as amended in, Social Security Act § 1869(b), 42 U.S.C. § 1395ff(b) (1982 ed., Supp. II).

Congress also did not authorize administrative or judicial review of coverage and payment determinations under Part B for either beneficiaries or providers. Rather, Congress simply provided that carriers, as part of their responsibilities under their contracts with HEW, would conduct fair hearings for beneficiaries in disputes over the carriers' coverage and payment determinations.[214] According to the Senate Finance Committee, this approach was justified because under Part B "claims will probably be for substantially smaller amounts than under Part A."[215] As with claims of providers under Part A, Part B claimants are also subject to § 205(h) with its bar to federal question jurisdiction by virtue of § 1872 of the Social Security Act.[216]

2. Early Concerns and Problems

Several problems emerged with the appeals process shortly after the Medicare program got under way which Congress specifically addressed in the Social Security Amendments of 1972. Many other concerns, i.e., the statutory preclusion of administrative and judicial review of Part B claims, did not precipitate congressional action and, in so far as they persist today, will be discussed later in this report. The two problems which Congress did address in the Social Security Amendments of 1972 are discussed below.

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[213] Social Security Amendments of 1965, § 102(a), codified as amended in, Social Security Act § 1872, 42 U.S.C. § 1395ii (1982 ed., Supp. II). Section 205(h) provides:

> The findings and decision of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 1331 or 1346 of Title 28 to recover on any claim arising under this subchapter. Social Security Act § 205(h), 42 U.S.C. § 405(h) (1982 ed., Supp. II).

[214] Social Security Amendments of 1965 § 102(a), codified as amended in, Social Security Act § 1842(c)(7), 42 U.S.C. § 1395u(c)(7) (1982 ed., Supp. II). This right to a fair hearing has been extended to providers who accept assignment of a beneficiary's Part B benefits. See note 304 infra and accompanying text.

[215] S. Rep. No. 404, 89th Cong., 2d Sess. 55 (1965).

[216] Social Security Amendments of 1965, § 102(a), codified as amended in, Social Security Act § 1872, 42 U.S.C. § 1395ii (1982 ed., Supp. II).

The Provider Reimbursement Review Board (PRRB). Providers, having substantial and complex disputes with fiscal intermediaries and the Medicare program over payment under the cost reimbursement system, objected to the informality of intermediary hearing proceedings and the lack of administrative or judicial review for the intermediary's final payment determination.[217] In 1972, a federal district court, in Coral Gables Convalescent Home, Inc. v. Richardson,[218] ruled that extant intermediary hearing procedures with no appeal to the Secretary and no guidance through HEW regulations violated providers' right to procedural due process. This court ordered the Secretary to promulgate any necessary regulations to correct these constitutional deficiencies, and the Secretary promulgated regulations accordingly.[219]

Providers were particularly dissatisfied with the preclusion of judicial review of intermediary decisions in payment disputes. Some courts, compelled by the harshness of this statutory preclusion, did find other grounds for federal question jurisdiction.[220] However, most courts refused to acknowledge federal jurisdiction in Medicare payment cases[221] especially after the Supreme Court's 1972 decision, Weinberger v. Salfi,[222] clarifying that § 205(h)'s bar to federal question jurisdiction applied to all payment claims under the Social Security Act even when the claimant raised an associated constitutional issue.[223]

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[217] See Homer & Platten, Medicare Provider Reimbursement Disputes: An Analysis of the Administrative Hearing Procedures, 63 Geo. L.J. 107 (1974). This article was written by prominent provider lawyers and identifies provider concerns with these administrative hearing procedures.

[218] 340 F. Supp. 646 (S.D. Fla. 1972).

[219] See 37 Fed. Reg. 10,724 (codified at 20 C.F.R. §§ 405.490-.499 (1974)).

[220] See, e.g., Adams Nursing Home of Williamston, Inc. v. Mathews, 548 F.2d 1077 (1st Cir. 1977); Rothman v. Hospital Service of Southern California, 510 F.2d 956 (9th Cir. 1975); Kingsbrook Jewish Medical Center v. Richardson, 486 F.2d 663 (2d Cir. 1973); Aquavella v. Mathews, 437 F.2d 397 (2d Cir. 1971).

[221] See, e.g., Faith Hospital Association v. Blue Cross Hospital Service, Inc., 537 F.2d 294 (8th Cir. 1976), cert. denied, 429 U.S. 977 (1976); St. Louis University v. Blue Cross Hospital Service, Inc., 537 F.2d 283 (8th Cir. 1976), cert. denied, 429 U.S. 977 (1976); South Windsor Convalescent Home, Inc. v. Mathews, 541 F.2d 910 (2d cir. 1976); cf., MacDonald Foundation, Inc. v. Mathews, 571 F.2d 328 (5th Cir. 1978), vacating, dismissing and transferring on jurisdictional grounds, 554 F.2d 714 (5th Cir. 1977), denying rehearing of, 534 F.2d 633 (5th Cir. 1976), cert denied, 739 U.S. 893 (1978).

[222] 422 U.S. 749 (1975).

Responding to these provider concerns and frankly stating that Congress had overlooked the resolution of provider disputes in originally designing the Medicare appeals system,[224] Congress established the Provider Reimbursement Review Board (PRRB) in the Social Security Amendments of 1972 to adjudicate payment disputes arising between providers and intermediaries in cost reporting periods ending after June 30, 1973.[225] Congress also authorized judicial review of PRRB decisions.[226]

Waiver of Liability. Beneficiaries had several concerns about coverage determinations under Part A and Part B in the early years of the Medicare program.[227] The most serious problem resulted from HEW policies, precipitated by escalating costs and high utilization rates, interpreting statutory definitions of benefits more strictly and then denying coverage of and payment for services already provided on a retroactive basis.[228] This was particularly a problem with skilled nursing benefits. In 1968, the Social Security Administration instructed fiscal intermediaries and carriers to define covered "skilled nursing services" more narrowly and proscribed "custodial care" more broadly to reduce utilization and thus cost of skilled nursing home services for Medicare beneficiaries.[229] Following these policy changes, fiscal intermediaries denied a large volume of skilled nursing home services on a retroactive basis, causing severe financial hardship for beneficiaries who thought Medicare would pay for their care and for providers which furnished expensive services with the expectation of being paid.[230]

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[223] See Comment, Federal Question Jurisdiction Over Medicare Provider Appeals After Weinberger v. Salfi: Toward a Principled Construction of the Statutory Bar, 65 Va. L. Rev. 1383 (1979).

[224] S. Rep. No. 1230, 92d Cong., 2d Sess. 248 (1972). See Homer & Platten, supra note 217, at 119.

[225] Social Security Amendments of 1972, § 243(a), codified as amended in, Social Security Act § 1878, 42 U.S.C. § 1395oo (1982 ed., Supp. II).

[226] Social Security Amendments of 1972, § 243(a), codified as amended in, Social Security Act § 1878(a), 42 U.S.C. § 1395oo(a) (1982 ed., Supp. II).

[227] See Butler, Advocate's Guide to the Medicare Program, 8 Clearinghouse Rev. 831 (1974); Butler, Medicare Appeal Procedures: A Constitutional Analysis, 70 Nw. L. Rev. 139 (1975). These articles, by a recognized advocate of beneficiary rights, review the objections to the early Medicare appeals procedures from the beneficiary's perspective.

[228] Butler, An Advocates Guide, supra note 227, at 836-837.

[229] Part A Intermediary Letter No. 328 (June 1968); 20 C.F.R. § 405.125-.127 (1974). See Butler, An Advocate's Guide, supra note 227, at 837.

Congress, concerned about these retroactive denials and their implications for beneficiaries, specifically sought to mitigate the harsh and unfair results of these practices. In the Social Security Amendments of 1972, Congress authorized the Medicare program to waive the liability of beneficiaries or providers for any services provided that were subsequently determined not to be covered Medicare benefits according to medical criteria, i.e., not medically necessary or constituting custodial care, if they did not know or had no reason to know that the services were not covered.[231]

B. The Present Medicare Appeals System

Analytically, it is useful to think of the present Medicare appeals system for coverage and payment disputes as a tree with the first division separating appeals procedures for Part A from those for Part B. A diagram of the appeals processes for disputes of beneficiaries and providers over coverage of and payment for Medicare benefits is included in Appendix B. For Part A, the major branch divides into two branches: one for beneficiary appeals of coverage determinations[232] and one for provider appeals of payment determinations. The Part B branch does not divide as there is a combined process for beneficiary appeals of both coverage and payment determinations with providers having appeal rights only if they accept assignment of Part B benefits from beneficiaries.[233] Included in the branch for beneficiary appeals under both Part A and Part B is an appeals process to determine whether the Medicare program should waive the liability of the beneficiary and/or the provider for a service determined to be not a covered benefit under the Medicare program on medical grounds.[234]

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[230] Id.

[231] Social Security Amendments of 1972 § 213(a), codified as amended in, Social Security Act § 1879, 42 U.S.C. § 1395pp (1982 ed., Supp. II). See notes 323-340 infra and accompanying text.

[232] Beneficiaries may appeal adverse eligibility determinations under Part A and Part B. Social Security Act § 1869, 42 U.S.C. § 1395ff (1982 ed., Supp. II). Appeals may be taken to an Administrative Law Judge in the Social Security Administration and, ultimately, to federal court and no specified amount in controversy is required. Providers under Part A may also appeal adverse decisions regarding their eligibility to participate in the Medicare program. Social Security Act § 1869, 42 U.S.C. § 1395ff (1982 ed., Supp. II). 42 C.F.R. § 405.1501-.1595 (1986).

[233] See note 304 infra and accompanying text.

1. Beneficiary Appeals Under Part A

For skilled nursing and home health services, the fiscal intermediary makes the initial coverage and payment determination regarding Medicare benefits provided a beneficiary including whether the services are covered according to medical criteria, i.e., whether the services were medically necessary or constituted custodial care.[235] Beneficiaries may obtain reconsideration of this initial determination from HCFA.[236] PROs, rather than fiscal intermediaries, make the initial determination that a hospital service is not a covered Medicare benefit according to medical criteria.[237] Congress has effectively delegated the authority to determine coverage of inpatient hospital benefits to PROs,[238] although HCFA has taken the position that the PRO determination on coverage does not supersede HCFA's authority to enforce coverage provisions of the Social Security Act.[239]

After receiving a notice of initial determination of benefits and payment, the first step of a beneficiary appeal of a dispute over coverage of or, less often, payment for Medicare benefits is reconsideration by the fiscal intermediary in the case of skilled nursing and home health benefits or by the

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[234] There are no appeal rights for any other party besides a beneficiary or provider affected by a HCFA coverage decision, even those coverage decisions of HCFA, fiscal intermediaries or carriers regarding whether to pay for new medical technologies and procedures.

See note 54 supra and accompanying text. Health equipment manufacturers have pressed for creation of an appeals process for this type of global coverage decision. See Health Industry Manufacturers Association, Recommendations of the HIMA Product Introduction Coordination Task Force (May 29, 1986).

[235] 42 C.F.R. at §§ 405.704(b)(11) and (12) (1986).

[236] Id. at §§ 405.710-.717.

[237] Id. at §§ 405.710-.717.

[238] See note 126-130, 193-197 supra and accompanying text.

[239] 42 C.F.R. § 466.86(c) (1986).

PRO in the case of hospital benefits.[240] PROs handle all appeals of their initial determinations on benefit and coverage issues for beneficiaries and providers.[241] The reconsideration is basically a paper review at which the beneficiary is generally not present nor represented by counsel. In the PRO reconsideration procedure the beneficiary, physician or hospital may submit additional information and examine the material on which the PRO based its initial determination although the PRO may not disclose the record of the PRO deliberation or the identity of the decision makers.[242] The decision maker in the reconsideration must be a physician who did not make the initial determination.[243]

The Social Security Act § 1869(b) authorizes administrative review of the determinations by fiscal intermediaries on coverage of benefits of $100 or above and judicial review of claims of $1,000 or above.[244] Fiscal intermediaries, except in the case of hospital benefits,[245] handle appeals of disputes over benefits under $100. TEFRA expressly gave PROs the responsibility of handling beneficiary appeals of hospital benefit coverage determinations made according to medical criteria.[246]

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[240] See id. §§ 405.710-.717. (fiscal intermediary reconsideration process); id. at §§ 473.16-.38 (PRO reconsideration process).

[241] Social Security Act §§ 1862(g) and 1154(a)(2), 42 U.S.C. §§ 1395y(g) and 1320c-3(a)(2) (1982 ed., Supp. II); 42 C.F.R. §§ 466.83-.86 (1986). See Medicare Beneficiary Appeals Process in Technical Appendixes to the ProPAC Report and Recommendations to the Secretary April 1, 1986, Appendix C, at 162.

Before making an initial denial determination or change in a DRG classification, the PRO must notify the provider and the beneficiary's physician and allow them an opportunity to discuss the matter with the PRO's physician advisor. 42 C.F.R. § 466.93 (1986). Once the PRO has made a determination to deny coverage on medical grounds, it is required to give notice of this denial to the beneficiary, the attending physician, the provider and the fiscal intermediary. Id. at § 466.94. This notice must also advise the beneficiary of the available right for reconsideration by the PRO. Id. at § 466.94(c).

[242] Id. at § 473.24.

[243] Id. at § 473.28.

[244] Social Security Act § 1869(b), 42 U.S.C. 1395ii(b) (1982 ed., Supp. II). This section provides:

> Any individual dissatisfied with any determination under subsection (a) as to . . . (C) the amount of benefits under part A . . . shall be entitled to a hearing thereon by the Secretary to the same extent as provided in section 205(b) and to judicial review of the Secretary's final decision after such hearing as is provided in section 205(g).

Id. See 42 C.F.R. § 405.704 (1986).

Administrative review before an Administrative Law Judge (ALJ) in the Social Security Office of Hearings and Appeals is available for beneficiary appeals under Part A of $100 and above.[247] In FY 1985, there were 3,927 requests for ALJ hearings for both Part A coverage determinations and some Medicare eligibility issues -- a decline of 4% from ALJ hearing requests in FY 1984.[248] A beneficiary may appeal the final decision of the PRO in a hospital medical coverage appeal to an ALJ in SSA if the amount in controversy is $200 or more.[249] For all other Part A coverage issues, the requisite amount in controversy for an ALJ hearing is $100 or more.[250]

The ALJ proceeding is the first opportunity for an oral hearing at which a beneficiary may personally appear and plead his case although an oral hearing may be waived.[251] The role of the ALJ in Part A coverage appeals, as in other Social Security program appeals, is that of a non-partisan examiner rather than a judge in an adversary hearing.[252] In these proceedings, HHS is not represented by counsel and the individual claimant may be represented by counsel if desired.[253] The ALJ has primary responsibility for developing the record, in contrast to conventional adjudicative proceedings in which counsel for the parties has this responsibility.[254] There is also an expedited appeals process for cases where the beneficiary has claimed, and HHS agrees, that the only factor preventing a favorable decision for the beneficiary is a statutory or regulatory provision that the beneficiary maintains is unconstitutional.[255]

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[245] See note 246 infra and accompanying text.

[246] Tax Equity and Fiscal Responsibility Act of 1982, §§ 142 and 143, codified as amended in, Social Security Act §§ 1862(g) and 1154(a)(2); 42 U.S.C. §§ 1395y and 1320c-3 (1982 ed., Supp. II). The only coverage appeals regarding hospital services that fiscal intermediaries now handle are those regarding technical determinations of whether a service is a covered benefit under the statute or regulations. 42 C.F.R. § 466.86(c)(2) (1986).

[247] Social Security Act §§ 1869(b)(1)(C) and (2), 42 U.S.C. § 1395ff(b)(1)(C) and (2) (1982 ed., Supp. II); 42 C.F.R. §§ 405.720 and 422.203-.210 (1986).

[248] Social Security Administration, Operational Report of the Office of Hearings and Appeals 28 (1985).

[249] Social Security Act § 1155, 42 U.S.C. § 1320c-4 (1982 ed., Supp. II); 42 C.F.R. § 473.10 (1986).

[250] Social Security Act § 1869(b)(2), 42 U.S.C. § 1395ff(b)(2) (1982 ed., Supp. II); 42 C.F.R. § 405.720.

[251] 20 C.F.R. §§ 404.944 and .948 (1986).

A claimant dissatisfied with the ALJ's decision may request review by the Appeals Council of the Social Security Administration in its Office of Hearings and Appeals.[256] The Appeals Council may also review and reverse an ALJ decision on its own motion.[257] The Appeals Council may review a case if it is alleged that there is an abuse of discretion by the ALJ or an error of law, the record indicates that the decision is not supported by substantial evidence, or there is a broad policy or procedural issue that may affect the general public interest.[258] HCFA also may review and refer to the Appeals Council under its reopening provisions,[259] any ALJ or Appeals Council decision that it believes is contrary to the Medicare statute and regulations.

For skilled nursing and home health agency appeals, a beneficiary may seek judicial review of a final decision of the Secretary if the amount in controversy is $1,000 or more.[260] For a coverage decision on hospital services decided by a PRO, a beneficiary may seek judicial review of a final decision of the Secretary if the amount in controversy is at least $2,000.[261] To obtain judicial review for all Part A beneficiary coverage appeals, suit must be brought within 60 days in the federal district court for the judicial district in which the claimant resides, where the individual, institution, or agency has a principle place of business, or in United States District Court for the District of Columbia.[262]

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[252] See Richardson v. Perales, 402 U.S. 389 (1971) in which the Supreme Court upheld the investigatory model for ALJ conduct in Social Security disability hearings. See also J. Mashaw, Social Security Hearings and Appeals (1978).

[253] 42 C.F.R. §§ 404.1700-.1710 (1986).

[254] Id. at § 404.951.

[255] Id. at §§ 405.718-.718e (1986).

[256] Id. at § 405.724 and 20 C.F.R. § 405.967 (1986) (skilled nursing facility and home health agency appeals); 42 C.F.R. §§ 473.40, .46(a) (1986) (hospital appeals).

[257] 20 C.F.R. § 404.969 (1986).

[258] Id. at § 404.970 (1986).

[259] Id. at 404.987-.988. 42 C.F.R. § 405.750 (1986).

2. Provider Appeals Under Part A

Provider appeals under Part A are adjudicated by the PRRB if the amount in controversy is $10,000 or above and by the provider's fiscal intermediary if the amount in controversy is between $1,000 and $10,000.[263] All institutional providers paid under Part A, including skilled nursing facilities and home health agencies, can appeal to the PRRB.[264] In 1984, approximately 1,500 appeals were made to the PRRB.[265]

The Social Security Amendments of 1983 expressly provided that hospital payment disputes would be handled under existing appeals procedures but limited with respect to the issues that could be appealed.[266] Congress specifically

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[260] Social Security Act § 1869(b)(2), 42 U.S.C. § 1395ff(b)(2) (1982 ed., Supp. II); 42 C.F.R. § 405.730 (1986).

[261] Social Security Act § 1155, 42 U.S.C. § 1320c-4 (1982 ed., Supp. II); 42 C.F.R. § 473.46(b) (1986).

[262] Social Security Act § 205(g), 42 U.S.C. § 405(g) (1982 ed., Supp. II).

[263] Social Security Act § 1878(a), 42 U.S.C. § 1395oo(a) (1982 ed., Supp. II); 42 C.F.R. § 405.1801-.1890 (1986). In order for an intermediary to provide a hearing, the amount in controversy must be at least $1,000. Id. at § 405.1811.

[264] Social Security Act § 1878(a), 42 U.S.C. § 1395oo(a) (1982 ed., Supp. II); 42 C.F.R. § 405.1801(b)(1) (1986).

[265] See table on PRRB performance statistics in Appendix C.

[266] Social Security Amendments of 1983, § 602(h), codified as amended in, Social Security Act §§ 1878(g)(2) and 1886(d)(7), 42 U.S.C. §§ 1395oo(g)(2) and 1395ww(d)(7) (1982 ed., Supp. II).

The Social Security Amendments of 1983 preclude administrative and judicial review of: (1) the establishment of DRG's, the methodology for classifying patient discharges into DRG's and the appropriate weighting factors for DRG's;

intended that hospital appeals over payment disputes be heard by the PRRB, as the House Ways and Means Committee explained:

> Your Committee's bill would provide for the same procedures for administrative and judicial review of payments under the prospective payment system as is currently provided for cost-based payments. In general, the same conditions, which now apply for review by the PRRB and the courts, would continue to apply.[267]

Thus Congress amended § 1878 of the Social Security Act to accord the PRRB jurisdiction to hear challenges to the "final determination of the Secretary as to the amount of payment" under the prospective payment system.[268]

The PRRB. The PRRB, comprised of five members appointed for three year terms, knowledgeable in health care financing appointed by the Secretary,[269] adjudicates payment disputes between providers and fiscal intermediaries[270] if the amount in controversy is at least $10,000 and the provider files a request for hearing within the prescribed time period.[271] A group of providers may bring a joint appeal if the disputed issues involve a common question of fact or interpretation of law or regulation and the aggregate amount in controversy is

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and (2) the factor used in a hospital's current payment formula to ensure compliance with the so-called "budget neutrality" requirement that the prospective payment system result in total Medicare payments to hospitals in FY 1984 and FY 1985 equal to what would have been payable under the previous Medicare payment methodology in those fiscal years. See notes 544-554 infra and accompanying text.

[267] H.R. Rep. No. 25, 98th Cong., 1st Sess. 143 (1983). See also S. Rep. No. 23, 98th Cong., 1st Sess. 57 (1983).

[268] Social Security Amendments of 1983, § 602(h)(1), codified as amended in, Social Security Act § 1878(a)(1), 42 U.S.C. § 1395oo(a)(1) (1982 ed., Supp. II).

[269] Social Security Act § 1878(h), 42 U.S.C. § 1395oo(h) (1982 ed., Supp. II); 42 C.F.R. § 405.1845. Two board members must be representative of providers; and a quorum of three members, including at least one provider representative, is required for a PRRB decision. Id.

[270] The parties before a Board hearing are the provider and its fiscal intermediary. Social Security Act § 1878(a), 42 U.S.C. § 1395oo(a) (1982 ed., Supp. II).

[271] Id.

$50,000 or more.[272] The PRRB has jurisdiction to adjudicate the intermediary's determination of total reimbursement for services to Medicare beneficiaries and the intermediary's final determination of payment under § 1886(b) and § 1886(d) of the Social Security Act.[273] The PRRB may also hear appeals regarding the intermediary's failure to furnish a provider with a final determination of the Medicare payment amount on a timely basis.[274] The PRRB has no authority to adjudicate coverage issues[275] nor the validity of Medicare regulations or program directives.[276] In its decisions, the board must observe the statute and regulations as well as HCFA rulings and must "afford great weight" to interpretative rules and other HCFA directives.[277]

Hearings before the PRRB are formal adjudicative hearings. A provider may be represented by counsel, conduct prehearing discovery[278] and, at the hearing, cross-examine witnesses.[279] The Board has subpoena power to compel attendance and testimony of witnesses as well as the production of documents and other evidence.[280] If a party raises an issue of HHS policy which is interpretative of the Medicare statute and regulations, the Board must promptly notify HCFA[281] Expedited review is available for issues of law over which the board has jurisdiction but no authority to decide.[282] A PRRB decision must be based on the hearing record and be supported by substantial evidence when the record is viewed as a whole.[283] The Board's decision is final.[284]

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[272] Social Security Act § 1878(b), 42 U.S.C. § 1395oo(b) (1982 ed., Supp. II); 42 C.F.R. § 405.1837.

[273] Social Security Act §§ 1886(b) and (d); 42 U.S.C. §§ 1395ww(b) and (d) (1982 ed; Supp. II).

[274] Social Security Act § 1878(a)(1)(C); 42 U.S.C. § 1395oo(a)(1)(C) (1982 ed., Supp. II).

[275] Social Security Act § 1878(g)(1), 42 U.S.C. § 1395oo(g)(1) (1982 ed., Supp. II); 42 C.F.R. § 405.1873 (1986).

[276] 42 C.F.R. § 405.1873 (1986). See HCFA Admr. Dec., Feb 15, 1980, rev'g, PRRB Dec. No. 79-D95, Dec. 17, 1979. This Deputy Administrator's decision was affirmed in Indiana Hospital Association v. Schweiker 544 F. Supp. 1167 (S.D. Ind. 1982), aff'd sub. nom., St. Francis Hospital Center v. Heckler, 714 F.2d 822 (7th Cir. 1983), cert. denied, 465 U.S. 1022 (1980).

Basically, the PRRB has authority to affirm, modify or reverse a final determination by the fiscal intermediary with respect to a cost report and to make any other revisions on matters covered by such cost report. Social Security Act § 1878(d), 42 U.S.C. § 1395oo(d) (1982 ed., Supp. II); 42 C.F.R. § 405.1869 (1986).

[277] Id. at § 405.1867.

[278] Id. at § 405.1851.

The Secretary has authority to reverse, affirm or modify the Board's decision on his own motion and within 60 days after the provider is notified of the Board's decision.[285] The criteria for reversal are that the Board has made an erroneous interpretation of the law, regulations or HCFA ruling; the decision is not supported by substantial evidence; the case presents a significant policy issue that might lead to issuance of a HCFA ruling or other directive; the Board has incorrectly assumed or denied jurisdiction; or the decision needs clarification, amplification or an alternative legal basis.[286] As will be discussed below, this review authority has been a source of serious provider concern because of the high rate of reversals of PRRB decisions by the Secretary.[287]

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[279] Social Security Act § 1878(c), 42 U.S.C. § 1395oo(c) (1982 ed., Supp. II); 42 C.F.R. §§ 405.1853 -.1855 (1986).

[280] Id. at § 1857.

[281] Id. at § 405.1863.

[282] Social Security Act § 1878(f), 42 U.S.C. § 1395oo(j) (1982 ed., Supp. II); 42 C.F.R. § 405.1842 (1986). This procedure has been used 160 times since its creation in 1981 and on January 31, 1986. See table on PRRB performance statistics in Appendix C.

[283] Social Security Act § 1878(d), 42 U.S.C. § 1395oo(d) (1982 ed., Supp. II); 42 C.F.R. § 1871(a) (1986).

[284] Social Security Act § 1878(f)(1), 42 U.S.C. §1395oo(f)(1) (1982 ed., Supp. II); 42 C.F.R. § 1871(b) (1986).

[285] Social Security Act § 1878(f)(1), 42 U.S.C. § 1395oo(f)(1) (1982 ed., Supp. II). The Secretary has delegated this authority to the HCFA Deputy Administrator. 42 Fed. Reg. 57,351 (1977).

[286] 42 C.F.R. § 405.1875(c) (1986).

A provider has the right to judicial review of any final decision of the Board or subsequent Secretarial action on that decision.[288] Suit must be brought within 60 days of receipt of the Secretary's final decision in the federal district court of the judicial district in which the provider is located or in the District Court for the District of Columbia.[289] A group appeal of several providers may be brought in the judicial district in which the greatest number of providers are located or in the District Court for the District of Columbia.[290]

It has yet to be determined how extensive or influential the role of the PRRB will be under the prospective payment system. The Board has not yet begun to hear hospital appeals of issues arising under the prospective payment system because of HCFA's requirement, discussed below, that the intermediary issue a notice of program reimbursement before a hospital may initiate an appeal to the PRRB.[291] The PRRB still hears appeals of home health agencies and skilled nursing facilities as well as psychiatric and rehabilitation hospitals that are not paid under the prospective payment system.[292] The PRRB also retains jurisdiction over a wide variety of issues for hospitals under the prospective payment system -- including allowable hospital costs for the base year period; capital and educational costs; the status of hospitals or their components dispositive in determining whether or not the hospital or component is paid under the prospective payment system; and the applicability of exemptions, exceptions and adjustments such as those available for sole community hospitals and cancer hospitals.[293] It is expected that these later two issues will generate a considerable volume of appeals and litigation because of the significant financial ramifications for hospitals of such status determinations.[294]

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[287] See notes 488-489 infra and accompanying text.

[288] Social Security Act § 1878(f)(1), 42 U.S.C. § 1395oo(f)(1) (1982 ed., Supp. II).

It should be noted that there is no express authorization in the Social Security Act or regulations thereunder authorizing judicial review provider payment disputes under $10,000.

[289] Id.

[290] Id.

[291] See notes 465-472 infra and accompanying text.

[292] See Owens, The PRRB Lives On As an Appeal Mechanism for Healthcare Providers, Health Care Fin. Management, Aug. 1986, at 36.

The PRRB also has a considerable backlog of hospital appeals on issues arising under the hospital cost reimbursement system, i.e., allocations for labor and delivery room and malpractice insurance costs.[295] However, the number of appeals before the PRRB has increased considerably since 1981. As indicated in the table on PRRB performance statistics in Appendix C, PRRB appeals increased 80% between 1981 and 1982, remained constant the following year, and increased 40% between 1984 and 1985. But, irrespective of what transpires under the prospective payment system, the Board anticipates that it will continue to hear a high volume of hospital appeals until well beyond 1987 as well as a rising volume of home health agency appeals and skilled nursing facility appeals indefinitely.[296]

PRO Appeals for Hospitals. For hospitals, PROs also adjudicate certain coverage issues related to payment arising under the prospective payment system. These include (1) disputes over outliers (cases which greatly exceed the length of stay and/or the estimated costs of the DRG in which the outlier case is assigned),[297] and (2) errors in DRG coding for a particular case.[298] HCFA adopted this approach maintaining that the entity that makes the initial determination should hear the appeal.[299] HCFA has also decided that the "waiver of liability" regulations will govern hearing and appeals if the PRO denies an entire stay or a "day" or "cost" outlier under § 1862(a)(1) or § 1861(a)(9) of the Social Security Act because services rendered were neither medically necessary, reasonable or constituted custodial care.[300] If the provider is dissatisfied with a PRO determination, it may seek a reconsideration by the PRO; however, the provider is not entitled to further administrative or judicial review of the PRO determination.[301]

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[293] See Owens, supra note 292 at 36-40; Clinton, Provider Appeals Route Evolving Under the Medicare Prospective Payment System, Health L. Vigil, Nov. 29, 1985, at 19-24; Clinton, PRRB Appeals Evolving Under PPS, The Health Law., Winter 1985, at 1, 14-15.

[294] See generally Owens, supra note 292.

[295] Owens, supra note 292.

[296] Id.; Clinton, supra note 293, at 19.

[297] See note 159 supra and accompanying text.

[298] Preamble to Interim Final Rule, 48 Fed. Reg. 39,740, 39,785-786 (1983).

[299] Id. at 39,785.

3. Appeals Under Part B

In the Social Security Amendments of 1965, Congress specifically precluded administrative and judicial review for beneficiary and provider disputes arising under Part B of the Medicare program on the assumption that the amounts involved in Part B claims would be small and therefore elaborate appeals procedures would be unnecessary.[302] The only provision for appeals regarding Part B benefits that Congress made was a requirement in each carrier contract that the carrier:

> establish and maintain procedures pursuant to which an individual enrolled under this part [Part B] will be granted an opportunity for a fair hearing by the carrier, in any case where the amount in controversy is $100 or more, when requests for payment under this part with respect to services furnished him are denied or are not acted upon with reasonable promptness or when the amount of such payment is in controversy.[303]

These fair hearing appeal procedures are available to any beneficiary and to any provider who has accepted assignment of a beneficiary's claim for Part B benefits.[304]

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[300] _Id_. at 39,784. _See_ 42 C.F.R. §§ 405.330-.332 (1986).

[301] Social Security Act § 1155, 42 U.S.C. §1320c-4 (1982 ed., Supp. II).

[302] See notes 214-215 _supra_ and accompanying text.

[303] Social Security Act § 1842(b)(3)(C); 42 U.S.C. § 1395u(b)(3)(C) (1982 ed., Supp. II). _See_ 42 C.F.R. § 405.801 _et seq_. (1986).

In _Gray Panthers v. Schweiker_, 652 F.2d 146 (D.C. Cir. 1980), the United States Court of Appeals for the District of Columbia Circuit ruled that procedural due process required more formal hearing procedures and additional protections for beneficiaries in cases of disputed claims of less than $100 than accorded under a carrier's paper review of its initial determination on the claim. See notes 504-509 _infra_ and accompanying text.

Upon making an initial determination of the coverage and amount of Medicare benefits, the carrier issues the "Explanation of Medicare Benefits" (EOMB) which specifies that the beneficiary and his assignee, i.e., the provider who accepts assignment, is entitled to a review of the carrier's initial determination.[305] In this review determination, the carrier must make a separate determination affirming or revising the initial determination.[306] The notice of this review determination must expressly state the basis for the determination and advise the beneficiary of the right to a fair hearing if the amount in controversy is $100 or more.[307] In 1984, carriers received 3.2 million requests for Part B review determinations and, of the 3 million processed to completion, 57% reversed the initial determination at an average cost per claim of $118 and an aggregate cost of $205 million.[308]

The fair hearing for claims of $100 or more is an oral hearing conducted by a hearing officer selected by the carrier.[309] At a fair hearing, the hearing officer may be disqualified if "prejudiced or partial with respect to any party" or has "any interest in the matter before him."[310] The regulations expressly provide that the fact that a hearing officer is an employee of the carrier may not serve as "prima facie cause for disqualification"[311] and, as a matter of fact, many hearing officers are carrier employees. The regulations do allow a party to challenge the hearing officer on bias grounds.[312] In 1984, carriers received about 30,000 requests for fair hearings and, of those processed to completion, 63% were decided in favor of the beneficiary at an average cost per claim of $439 and an aggregate of $5.8 million.[313]

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[304] Social Security Act § 1842(b)(3)(C), 42 U.S.C. § 1395u(b)(3)(C) (1982 ed., Supp. II); 42 C.F.R. § 405.801 (1986).

[305] Id. at § 405.807.

[306] Id. at § 405.810.

[307] Id. at § 405.811.

[308] Congressionl Research Service, Medicare Appeals: Background Paper (Oct. 1985), reprinted in, Senate Finance Comm. Hearings on Medicare Appeals Provisions.

[309] 42 C.F.R. § 405.830 (1986).

[310] Id. at § 405.824.

[311] Id.

At the fair hearing, the parties and anyone else the hearing officer deems necessary may appear and parties may be represented by counsel.[314] Parties may present evidence, examine all witnesses, make oral argument and submit briefs.[315] A record is made and is available upon request to the parties and HCFA.[316] The hearing officer's decision must be based on the record, be in writing and contain findings of fact and statement of reasons for the decision.[317] The decision is final unless reopened and modified as provided in the regulations.[318] There is no administrative or judicial review of the hearing officer's decision which, as will be discussed below, has raised much controversy in recent years.[319] As will also be discussed below, the Supreme Court, in Schweiker v. McClure[320] and

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[312] Id. at § 405.824.

[313] Congressional Research Service, Medicare Appeals: Background Paper (Oct. 1985), reprinted in, Senate Finance Comm. Hearings in Medicare Appeals Provisions, at 16.

[314] Id. at § 405.830.

[315] Id. at § 405.830.

[316] Id. at § 405.833.

[317] Id. at § 405.834.

[318] Id. at § 405.841.

[319] Social Security Act § 1869, 42 U.S.C. § 1395ff (1982 ed., Supp. II). See notes 519-523 infra and accompanying text.

[320] 456 U.S. 188 (1982).

United States v. Erika,[321] has upheld the statutory preclusion of judicial review of claims under Part B.[322]

4. Waiver of Liability Appeals

An important but distinct part of the benefit coverage determination under both Part A and Part B is the determination of whether the beneficiary or the provider should be financially liable for services that are determined to be not covered according to the medical criteria of being medically unnecessary or not provided in the appropriate setting, or constituting custodial care.[323] Waiver of liability determinations are generally made at the same time coverage determinations based on medical criteria are made. Thus, the PRO makes the waiver of liability determinations for hospital benefits; fiscal intermediaries make the waiver of liability determinations for skilled nursing and home health benefits; and carriers make these determinations for Part B services.[324]

A waiver of liability may apply where the beneficiary and/or the provider had no reason to know that the services would not be covered. In these cases, the Medicare program absorbs the cost of the uncovered services although the provider and beneficiary are then on notice for the future that such services are not covered.[325] As explained above, Congress adopted this waiver of liability policy in the Social Security Amendments of 1972 to address provider and beneficiary concerns about unpredictable and often inconsistent retroactive denials of coverage by fiscal intermediaries and carriers.[326]

With respect to beneficiaries, there is a strong presumption that the beneficiary did not know that the services in question were excluded from coverage and thus entitled to a waiver of liability which can be overcome only by demonstrating that the beneficiary knew or had reason to know that the services in question were not covered.[327] These presumptions in favor of the beneficiary are quite strong, and several courts have reiterated the great burden HHS has in demonstrating that the beneficiary had knowledge that past and even future services were not covered.[328]

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[321] 456 U.S. 201 (1982).

[322] See notes 523-529 infra and accompanying text.

[323] Social Security Act § 1879, 42 U.S.C. § 1395pp (1982 ed., Supp. II); 42 C.F.R. §§ 405.330-.332 (1986).

[324] 42 C.F.R. § 405.710 (1986) (Part A coverage issues for skilled nursing and home health services); id. at § 473.16 (hospital services); id. at § 405.807 (Part B coverage issues).

[325] Social Security Act § 1879(a), 42 U.S.C. § 1395pp(a) (1982 ed., Supp. II).

[326] Social Security Amendments of 1972, § 213(a), codified as amended in, Social Security Act § 1879, 42 U.S.C. § 1395pp (1982 ed., Supp. II). See notes 227-231 supra and accompanying text.

The criteria for whether the provider had knowledge that the services were uncovered are less strict. If the intermediary or the institution's utilization review committee told the provider that the services or similar services were not covered, then the provider is deemed to have knowledge for purposes of denying a waiver of liability.[329] As a practical matter, most waiver of liability issues concern the provider's rather than the beneficiary's liability for uncovered services. Until recently, HCFA had a procedure whereby providers under Part A were deemed to be entitled to a waiver of liability if the rate of coverage denials for the provider was below a certain percent. However, in March 1986, HCFA promulgated new rules on waiver of liability which discontinued this favorable presumption procedure and required that waiver of liability be determined on a case-by-case basis for all providers under Part A and Part B.[330]

The right to challenge a waiver of liability decision rests chiefly with the beneficiary and only secondarily with the provider. For Part A, a beneficiary may appeal the final decision of the fiscal intermediary or PRO (in the case of hospitals) on waiver of liability to an ALJ in the SSA Office of Hearings and Appeals if the amount in controversy is $100 or more.[331] The beneficiary is entitled to reconsideration by the SSA Appeals Council[332] and may seek judicial review of the final agency decision on waiver of liability, if the amount in controversy is $1,000 or more.[333] Section 1879(d) permits the provider to appeal a coverage issue to an ALJ and federal district court where a waiver of liability is not granted for the provider but only if the beneficiary decides not to appeal.[334]

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[327] Social Security Act § 1879(c), 42 U.S.C. § 1395pp(c) (1982 ed., Supp. II); 42 C.F.R. § 405.332 (1986). In order to demonstrate that a beneficiary knew or had reason to know that items or services furnished to him were excluded from coverage, the beneficiary, or someone acting on his behalf, must have received written notice stating that the items or services were excluded from coverage. Id.

[328] See, e.g., Himmler v. Califano, 611 F.2d 137 (6th Cir. 1979); Walsh v. Secretary of U.S. Dept. of Health and Human Services, 636 F. Supp. 358 (E.D.N.Y. 1986) (held against beneficiary due to receipt of written notice); Malvasi v. Harris, No. 79-CV-635 (N.D.N.Y. Jul. 30, 1980).

[329] 42 C.F.R. § 405.341 (1986).

[330] 51 Fed. Reg. 6,222 (1986), codified in, 42 C.F.R. § 405.336 (1986).

[331] Social Security Act § 1867(d), 42 U.S.C. § 1395pp(d) (1982 ed., Supp. II).

[332] 42 C.F.R. §§ 405.727 and .967 (1986).

The waiver of liability requirement for hospitals is somewhat different. If the PRO determines that the waiver should apply to uncovered services, the hospital has no right to appeal even if it disagrees about the underlying coverage determination.[335] If the PRO determines that the care was unnecessary and denies the waiver because the hospital knew or should have known so, the hospital is entitled to a hearing before an ALJ in SSA of whether it had knowledge that care was not covered but cannot challenge the substantive coverage decision upon which the denial of the waiver was predicated.[336] Hospitals may also seek judicial review for such decisions involving claims of $2,000 or more.[337]

Under Part B, a beneficiary may appeal a review determination of the carrier on waiver of liability to a hearing officer selected by the carrier if the amount in controversy is $100 or more.[338] If the provider is found liable for the service and the beneficiary does not exercise his appeal rights, the provider may request a hearing before the carrier.[339] There is no judicial review of a carrier decision on a waiver of liability determination for Part B benefits.[340]

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[333] Social Security Act § 1869(b)(2), 42 U.S.C. § 1395ff(b)(2) (1982 ed., Supp. II); 42 C.F.R. § 405.730 (1986).

[334] Social Security Act § 1879(d), 42 U.S.C. § 1395pp(d) (1982 ed., Supp. II).

Judicial Review is available only for claims exceeding $1000. Id.

[335] Social Security Act § 1155, 42 U.S.C. § 1320c-4 (1982 ed., Supp. II).

[336] Id.

[337] Id.

[338] Social Security Act § 1842(b)(3)(C), 42 U.S.C. § 1395u(b)(3)(C) (1982 ed., Supp. II); 42 C.F.R. § 405.820 and .823 (1986).

C. Recent Congressional Action on Medicare Appeals

With the implementation of the prospective payment system, Congress and HHS as well as beneficiary and provider interest groups have become quite concerned about the Medicare appeals system. Three factors have precipitated this concern.[341] First, there had been ongoing congressional concern about appeals under Part B as a result of reported underpayment by the Medicare program for Part B benefits as documented in several reports of the General Accounting Office[342] and court challenges and decisions on the constitutionality of Part B hearing procedures.[343] Second, there were reports that hospitals were discharging patients earlier and in a sicker condition as a direct result of implementation of the prospective payment system and that many patients, wishing to remain in the hospital, had inadequate information about their appeals rights to protest such hospital actions.[344] Third, early in 1985, provider and consumer organizations created a coalition specifically to pressure Congress for reforms of the Medicare appeals system.[345]

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[339] Id.

[340] Social Security Act § 1879(d), 42 U.S.C. § 1395pp(d) (1982 ed., Supp. II).

[341] See Congressional Research Service, Medicare Appeals Background Paper, reprinted in, Senate Finance Comm. Hearings on Medicare Appeals Provision.

[342] Government Accounting Office, Reasonable Charge Reductions under Part B of Medicare (HRD-81-12, Oct. 22, 1980); Government Accounting Office, More Action Needed to Reduce Beneficiary Underpayments (HRD-81-126, Sept. 3, 1981); Government Accounting Office, Medicare Part B Beneficiary Appeals Process (HRD-85-79, June 28, 1985).

[343] See United States v. Erika, Inc. 456 U.S. 201 (1982); Schweiker v. McClure, 456 U.S. 188 (1982); Gray Panthers v. Schweiker, 652 F.2d 146 (D.C. Cir. 1980) and 716 F.2d 23 (D.C. Cir. 1983). See notes 508-514 infra and accompanying text.

[344] See Senate Special Comm. on Aging, Hearings on Quality of Care Under Medicare's Prospective Payment, Sustaining the Quality of Health Care Under Cost Containment: Joint Hearing Before the House Select Comm. on Aging and the Task Force on the Rural Elderly, 99th Cong., 1st. Sess. (1985); Medicare Beneficiary Appeals Process Technical Appendixes to the ProPAC Report and Recommendations to the Secretary, April 1, 1986, Appendix C, at 162. Government Accounting Office, Information Requirements for Evaluating the Impacts of Medicare Prospective Payment on Post-Hospital Long-Term-Care Services: Preliminary Report (PEMD 85-8, Feb. 21, 1985) See notes 427-436 infra accompanying text.

In 1985, several congressmen introduced legislation to reform the Medicare appeals system.[346] The most important of these bills was Congressman Wyden's bill, H.R. 2864, The Fair Medicare Appeals Act,[347] which Congress included in its FY 1986 budget bill for COBRA in October 1985.[348] H.R. 2864, which was similar to S. 1551, The Fair Medicare Appeals Act,[349] introduced by Senators Durenberger, Heinz and Chafee and upon which hearings were held in November 1985,[350] provided for administrative appeal of Part B claims of $500 or more before an ALJ and judicial review of claims of $1,000 or more. In addition, both H.R. 2864 and S. 1551 would have allowed providers to represent beneficiaries in appeals.

The COBRA conference committee, whose report was ultimately rejected by the House, adopted these Medicare appeals provisions and also a requirement that a national coverage determination made pursuant to § 1862(a)(1)(A)[351] by HCFA after consultation with the Public Health Service and published in the Medicare

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[345] See Peterson, Legislative Changes Urged Regarding Medicare Appeals, Health L. Vigil, May 3, 1985, at 12.

This coalition included representatives of the American Hospital Association, the American Association of Homes for the Aging, the American Association of Retired Persons, the Catholic Health Association, the Federation of American Hospitals, the National Association for Home Care, and the National Senior Citizens Law Center and developed recommendations for a variety of reforms.

[346] On January 22, 1985, Congressman Chappell introduced H.R. 579 to allow administrative review of claims under Part B of the Medicare program of $50 or more and judicial review of claims of $1,000 or more. H.R. 579, 99th Cong., 1st Sess. (1985); 131 Cong. Rec. H129 (daily ed., Jan. 22, 1985).

[347] H.R. 2864, 99th Cong., 1st Sess. (1985) 131 Cong. Rec. H4845 (daily ed. June 25, 1985).

[348] H.R. 3128, 99th Cong., 1st Sess. (1985).

[349] S. 1551 99th Cong., 1st Sess. (1985); 131 Cong. Rec. § 10790 (daily ed. Aug. 1, 1985).

[350] See Senate Finance Comm. Hearings on Medicare Appeals Provisions.

[351] Social Security Act § 1862(a)(1)(A), 42 U.S.C. § 1395y(a)(1)(A) (1982 ed., Supp. II).

Coverage Issues Manual[352] cannot be reversed on appeal. The conferees also stated their expectation as to how HHS would handle Medicare appeals with the increased workload imposed by the bill:

> With the additional workload that would be established under the bill, it is the conferee's expectation that HHS would give serious consideration to establishing a separate office of hearings and appeals for HCFA or otherwise creating a group of hearing officers devoted exclusively or predominately to Medicare appeals.[353]

Congress dropped these appeals provisions from COBRA prior to enactment at the request of the Reagan administration.

Congress has also exhibited interest in Medicare appeals issues in this session of Congress. On March 17, 1986, Congressman Archer introduced a bill to improve the review procedure for all Social Security programs including Medicare.[354] Specifically, the bill would establish a Social Security Court with exclusive jurisdiction over various provisions of the Social Security Act, abolish the Appeals Council, and accord judicial review in the Social Security Court for any individual who is a party to any final decision of the Secretary or for whom the Secretary has delayed his final decisions longer than 90 days after an ALJ's determination. Also, the House Budget Committee has included a provision in its budget bill in FY 1987 nearly identical to the provision dropped from COBRA last year that would provide administrative review and judicial review for Part B claims.[355] Those bills as well as the bills introduced in the last session of Congress bear witness to Congress's continuing concern about the Medicare appeals system.

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[352] See note 29 supra and accompanying text.

[353] Proposed H.R. Rep. No. 453, 99th Cong., 1st Sess. (1985) (the House never adopted this conference report).

[354] H.R. 4419, Social Security Procedures Improvement Act of 1986, 99th Cong., 2d Sess. (1986); 132 Cong. Rec. H1204 (daily ed. March 17, 1986).

[355] H.R. 5300, § 4532, 99th Cong., 2d Sess. (1986). See H.R. Rep. 727, 99th Cong., 2d Sess. 95-96 (1986).

CHAPTER IV: PROGRAM ADMINISTRATION ISSUES

The Medicare program makes extraordinary and unprecedented use of private organizations to perform important administrative, monitoring and adjudicative functions for the Medicare program to the extent that most beneficiaries and providers rarely have direct contact with HCFA regarding Medicare coverage and payment determinations.[356] Beneficiaries and providers have raised consistent complaints about how HHS, HCFA and its fiscal intermediaries, carriers and, more recently, PROs, have administered the Medicare program with respect to coverage and payment matters. There are three major concerns in this regard. First is the way in which HCFA and its fiscal intermediaries and carriers make coverage and payment determinations in individual cases. Second is the process that HHS and HCFA have followed in updating the hospital payment rates under the prospective payment system. Finally, is HCFA's implementation of the PRO program almost completely through program instructions rather than informed rulemaking.

A. Intermediary and Carrier Coverage and Payment Determinations

Inherent in the administrative job of determining coverage of and payment for the health care services reflected in the 366 million claims of 30 million beneficiaries are multiple opportunities for discretionary action by the thousands of employees of fiscal intermediaries, carriers and PROs. The decisions to be made are highly technical and individualistic and cannot always be made exclusively with reference to a general regulation. Further, there is great pressure on fiscal intermediaries, carriers and PROs to make these determinations efficiently and as strictly as possible in order to control the administrative costs of the Medicare program.

There are three specific concerns with respect to how fiscal intermediaries and carriers make coverage and payment determinations in individual cases. First, the standards and guidelines for making coverage and payment decisions are contained in health insurance manuals and program instructions that are not promulgated under § 553 of the Administrative Procedure Act[357] and are not readily accessible to beneficiaries or even providers.[358] Second, fiscal intermediaries, carriers and now PROs, bound by restrictive HCFA program directives and subject to cost containment pressures imposed by their contracts with HCFA, are extremely strict in their coverage and payment determinations and, unfortunately, often wrong. Third, the manner in which carriers, fiscal intermediaries and also PROs advise beneficiaries and providers about coverage and payment determinations is very complex and often unclear and, in the case of beneficiaries, effectively precludes many beneficiaries from exercising their appeal rights in an informed fashion.

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[356] The question of whether the delegation of adjudicative authority to fiscal intermediaries and carriers is constitutionally valid has been raised and addressed in several judicial decisions: Chelsea Community Hospital v. Michigan Blue Cross Association, 630 F.2d 1131 (6th Cir. 1980); St. Louis University v. Blue Cross Hospital Services, 537 F. 2d 283 (8th Cir.) cert. denied, 429 U.S. 977 (1976); St. John's McNamara Hospital v. Associated Hospital Services, Inc., 410 F. Supp. (D.S.D. 1976); Langhorne Gardens, Inc. v. Weinberger, 371 F. Supp. 1216 (E.D. Pa. 1974); Temple University v. Associated Hospital Services of Philadelphia, 361 F. Supp. 263 (E.D. Pa. 1973); Coral Gables Convalescent Home, Inc. v. Richardson, 340 F. Supp. 646 (S.D. Fla. 1972). In these cases, the courts have ruled that the delegation was appropriate provided that certain safeguards (e.g., opportunity for fair hearing) were present. See Homer & Platten, supra note 217, at 123-129.

[357] 5 U.S.C. § 553 (1982 ed., Supp. II).

1. Use of Unpublished Standards and Guidelines

A major criticism of the coverage determination process is that HCFA has defined criteria for coverage through agency manuals and other program instructions that are not promulgated as rules under the Administrative Procedure Act.[359] These materials often further define coverage of Medicare benefits and can be critical in determining coverage in questionable cases. Also, these manuals are very complex and often inaccessible as well as incomprehensible to the average beneficiary or his representative.[360] But perhaps the most disturbing problem is that fiscal intermediaries and carriers often make coverage and payment decisions according to informal, unwritten policies that are used in the organization's insurance business and are not even HCFA program instructions.

This later problem is exemplified in the recent case, Fox v. Bowen,[361] involving the practice of one fiscal intermediary making coverage decisions about physical therapy services for patients in skilled nursing facilities on the basis of "rules of thumb" -- i.e., no coverage for non-weightbearing limbs, termination of benefits when patients can walk fifty feet, or no coverage for amputees who are not being fitted for a prosthesis -- that are not published in regulations, HCFA manuals or other official Medicare program instructions, and are inconsistent with existing regulations and manual provisions pertaining to coverage of physical therapy services.[362] In Fox v. Bowen, the United States District Court for Connecticut ruled:

> It is contrary to such regulations for an intermediary to deny benefits on the basis of informal presumptions or "rules of thumb," that are applied across the board without regard

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[358] See notes 28-29 supra and accompanying text.

[359] See notes 28-29 supra and accompanying text.

[360] Id.

[361] [1986-2 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 35,374 (D. Conn. Apr. 2, 1986).

[362] 42 C.F.R. §§ 409.30-.36 (1986); HHS, Skilled Nursing Manual (HIM-13) § 3101.08 (1986).

to the medical condition or therapeutic requirements of the individual patient.[363]

2. Restrictive Interpretations of Coverage Rules

The Medicare program encourages fiscal intermediaries and carriers to construe Medicare coverage rules strictly in order to minimize costs to the Medicare program and has done so since the early 1970s.[364] Specifically, in its health insurance manuals and other program directives, HCFA interprets statutory definitions of benefits more restrictively. An early example of this practice was the strict interpretation of "skilled nursing care" and expansive interpretation of "custodial care" in 1972 in order to reduce utilization of skilled nursing facility benefits by Medicare beneficiaries.[365] HCFA, fiscal intermediaries and carriers currently engage in this practice throughout the Medicare program.

For example, in determining the reasonableness of physician fees under Part B, HCFA and carriers use an especially restrictive formula for calculating the reasonable charge which results in a low level of payment for physicians' services.[366] In FY 1984, reasonable charge reductions -- i.e., the difference between the physician's billed charge and what the carrier calculates as the reasonable charge for purposes of Medicare payment -- were made on 83.1% of unassigned claims for a total of $2.7 billion which was picked up by beneficiaries and averaged $29.69 per approved claim.[367]

Certain practices regarding coverage determinations for home health services also deserve attention. The first is HCFA's "technical denials" policy pursuant to which the fiscal intermediary must deny payment for home health visits on grounds that the visit did not meet statutory or regulatory coverage requirements, i.e., the beneficiary was not "confined to home" or was not "in need of intermittent skilled nursing care."[368] Since these denials are not made on medical grounds, they are not subject to the waiver of liability rules; and thus the home health agency often has no way to appeal the determinations. Providers argue that the coverage requirements of being "confined to home" and "in need of skilled nursing care" involve medical determinations and should be subject to the waiver of liability rules.[369]

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[363] [1986-2 Tranfer Binder] Medicare & Medicaid Guide (CCH) ¶ 35,374, at 10,938.

[364] See Butler, An Advocate's Guide, supra note 227; Wilson, Benefit Cutbacks in the Medicare Program Through Administrative Agency Fiat Without Procedural Protections: Litigation Approaches on Behalf of Beneficiaries, 16 Gonz. L. Rev. 533 (1981).

[365] See notes 228-230 supra and accompanying text.

[366] See Government Accounting Office, Reasonable Charge Reductions Under Part B of Medicare (HRD-81-12, Oct. 22, 1980); Government Accounting Office, More Action Needed to Reduce Beneficiary Underpayments (HRD-81-126, Sept. 13, 1981). See also Government Accounting Office, Medicare Part B Beneficiary Appeals Process (HRD-85-79, June 28, 1985).

[367] Congressional Research Services, Physician Reimbursement Under Medicare: Background Paper, reprinted in, Senate Finance Comm. Hearings on Reform of Medicare Payments to Physicians, at 2, 26.

Another concern of home health agencies is HCFA's recent practice of denying coverage on essentially a statistical basis by using a sample of claims to project the total amount of overpayment that should be assessed for a cost year. HCFA effectively demands repayment for hypothetical claims that are not identified with a real claim. In a beneficiary appeal before on ALJ, In re Albuquerque Visiting Nursing Services, Inc.,[370] HCFA justified this approach on grounds of its "enormous logistical problems in enforcement."[371] The ALJ ruled that this practice was illegal, stating:

> Difficulty in enforcement cannot in any case confer authority for the government to act in contravention of law, or confer authority for the government to take action against individuals or private organizations where no such authority has been granted by Congress. The procedures for processing Medicare Part A claims, the remedies for recovery of overpayment on improper claims, the rights of the parties against each other, and the rights to appeal are all clearly delineated in the statutes and the regulations fully promulgated thereunder. Use of a sampling method contravenes those procedures and abrogates those rights. See 42 U.S.C. 1395ff and 1395pp and 42 C.F.R. 701 et seq. Individual review of each case is mandated. The liability of the provider, the individual and HCFA may only be determined by a fact review of each case. Id.[372]

On February 20, 1986, HCFA issued HCFAR-86-1 specifically authorizing Medicare carriers, fiscal intermediaries and PROs to use statistical sampling to project overpayments to providers and suppliers "when claims are voluminous and reflect a pattern of erroneous billing or overutilization and when a case-by-case review is not administratively feasible."[373] HCFA justified this approach on grounds that the federal government has an inherent right to recoup federal funds paid out illegally or erroneously and that this right has been extended to the Medicare program in several court of appeals decisions.[374] HCFA stated that use of sampling was necessary because the cost of determining overpayments for the "vast number" of Medicare claims on a case-by case basis would be "prohibitively high."[375] Issuance of this ruling suggests that HCFA plans to continue using sampling techniques to determine overpayments to home health agencies and other providers and suppliers. This practice mayill inhibit providers from delivering covered services to Medicare beneficiaries, although the HCFA ruling suggests that this ruling will curtail ongoing abuse of the program by providers.

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[368] 42 C.F.R. § 405.234 (1986).

[369] See Senate Finance Comm. Hearing on Medicare Appeals Provisions at 48-49 (statement of the Catholic Health Association on Medicare Appeals) and 129-132 (statement of the National Association for Home Care).

[370] No. HIP-000-61-0022 (Office of Hearing and Appeals, Social Security Administration, Jul. 1, 1985).

[371] Id.

[372] Id.

HCFA also encourages intermediaries and carriers to reduce costs of claims through the contracting process. For example, HCFA has allegedly awarded contracts to companies competing to become fiscal intermediaries for home health agencies on the basis of the company's past performance in denying coverage on Medicare claims.[376] Blue Cross and Blue Shield Association of America, on behalf of its member plans that comprise the great majority of Medicare intermediaries and carriers, argues that there are no such incentives and pressures to deny or underpay Medicare claims.[377] However, Blue Cross does acknowledge that severe budgetary pressures imposed by HCFA contracts have precluded improvements such as computer system upgrading and better beneficiary education that would mitigate the problem of underpaying or denying large volumes of beneficiary claims.[378] Some have also expressed concern that HCFA's contracts with PROs contain strong incentives for PROs to stress cost containment rather than quality improvement in their hospital reviews under the prospective payment system.[379]

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[373] HCFAR-86-1, Use of Statistical Sampling to Project Overpayment to Medicare Providers and Suppliers (Feb. 20, 1986).

[374] Id., citing, Mt. Sinai Hospital v. Weinberger, 517 F.2d 329 (5th Cir. 1975); Wilson Clinic and Hospital, Inc. v. Blue Cross, 494 F.2d 50 (4th Cir. 1974). HCFA also pointed out that several courts had recognized sampling as a "valid audit technique" in the Medicaid program, citing: Illinois Physicians Union v. Miller, 675 F.2d 151 (7th Cir. 1982); Georgia v. Califano, 446 F. Supp. 404 (N.D. Ga. 1977); New Jersey Welfare Rights Organization v. Cahil, 349 F. Supp. 501 (D.N.J. 1972); Rosado v. Wyman, 322 F. Supp. 1173 (E.D.N.Y. 1970), aff'd, 402 U.S. 911 (1971).

[375] HCFAR-81-6 supra note 383.

[376] See Senate Finance Comm. Hearings on Medicare Appeals Provisions at 169-178 (statement of the American Federation of Home Health Agencies).

[377] Id. at 294-297 (statement of Blue Cross and Blue Shield Association).

[378] Id. at 297.

Because of severe budgetary pressures, HCFA has exhorted these organizations to tighten up in their coverage determinations and often, as is the case with PROs, made reductions of utilization of hospital and other services a specific contract goal.[380] In its FY 1987 budget request, HHS asked for $7 million for a "management initiative" that "systematically focuses on home health utilization and the medical necessity of services, and anticipates that the medical review and audit activities under this initiative will yield $989 million in savings in FY 1987.[381] While such initiatives are certainly laudatory as well as essential, one might question whether they contain added incentives for intermediaries and carriers to curtail beneficiaries' benefits unfairly.

3. Information on Coverage Determinations

The third concern with respect to beneficiary coverage determinations is the nature of the information that fiscal intermediaries and carriers give beneficiaries advising them of the disposition of their claims and the status of their appeals. This has been a particularly controversial issue with respect to Part B chiefly because beneficiaries are directly liable for any services for which coverage is denied or for which payment does not cover the provider's full charge.

The nature of the Part B initial notice to Medicare beneficiaries -- the Explanation of Medicare Benefits (EOMB) -- was litigated in *Gray Panthers v. Heckler*.[382] The United States Court of Appeals for the District of Columbia ruled that the EOMB violated procedural due process because it was not comprehensible to an average elderly person and did not state the specific reason why a claim was denied in sufficient detail to allow a beneficiary to decide whether to appeal and on what basis. As a result of this litigation, HHS and counsel for the Gray Panthers agreed to substantial modifications of the EOMB form.[383] A copy of this revised EOMB form is attached in Appendix C. Most of these changes required additional explanation for a denial of coverage or limit on payment for services that describe the specific reason for the denial to the beneficiary and which give the beneficiary the requisite information to determine whether an error had been made and an appeal is appropriate.[384] Other changes include modifications in the appearance of the notice and the language, i.e., discontinuing use of insurance jargon used to explain actions on the claim.[385]

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[379] *See* *Senate Finance Comm. Hearings on Peer Review Organizations*; American Medical Peer Review Association, *PROs: The Future Agenda* (1985); Staff of the Senate Special Comm. on Aging, *Impact of Medicare's Prospective Payment System on the Quality of Care Received by Medicare Beneficiaries*, 99th Cong., 1st Sess. (1985); *Senate Special Comm. on Aging, Hearings on Quality of Care Under Medicare's Prospective Payment System*.

[380] *See generally* notes 128-130 *supra* and accompanying text.

[381] *HHS Fiscal Year 1987 Budget Request.*

[382] Gray Panthers v. Califano, 466 F. Supp. 1317 (D.D.C. 1979), *rev'd and remanded sub. nom.*, Gray Panthers v. Schweiker, 652 F.2d 146 (D.C. Cir. 1980), *reh'g on remand*, [1982 Tranfer Binder] *Medicare & Medicaid Guide (CCH)* ¶ 32,144 (D.D.C. Sept. 10, 1982), *remanded sub nom.*, Gray Panthers v. Schweiker, 716 F.2d 23 (D.C. Cir. 1983). See notes 504-509 *infra* and accompanying text.

Other communications of the Medicare program to its beneficiaries have come under similar attack. In David v. Heckler,[386] the United States District Court for the Eastern District of New York considered challenges to the information received in the reconsideration procedure before the beneficiary requests a fair hearing on a claim determination.[387] The court, concerned about the carrier's reasonable charge reductions and resulting financial liability of beneficiaries as well as the high rate of reversals on reconsiderations by the particular carrier involved in the case,[388] ruled in favor of the plaintiff beneficiaries. The court reasoned that the plaintiffs had been denied due process because "the notices do not detail reasons for adverse action"[389] and thus beneficiaries were "effectively denied an 'opportunity to meet' the case against them."[390] It should be pointed out that the court's criticism of the notice, in the words of a ProPAC report,[391] was "scathing:"

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[383] Gray Panthers v. Heckler [1986-1 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 34,981 (D.D.C. Nov. 4, 1985).

[384] Id.

[385] Id.

[386] 591 F. Supp. 1033 (E.D.N.Y. 1984).

[387] The court did not rule on the adequacy of the EOMB because this issue was before the United States District Court for the District of Columbia in Gray Panthers v. Schweiker, a nationwide class action suit. Id. at 36.

[388] The court commented on evidence that this carrier's reversal rate was often as high as 70% as well as the fact that only 3% of beneficiaries sought review of claims and .04% requested a fair hearing. Id. at 1044.

[389] Id. at 1043, citing, Goldberg v. Kelly, 397 U.S. 254 (1970).

[390] 591 F. Supp. at 1043 quoting, Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951).

> The fact is that the letters are written at a level well beyond most in this segment of the population, with no discernible added benefit from complexity in information provided. The language used is bureaucratic gobbledegook, jargon, double talk, a form of officialese, federalese and insurancese, and doublespeak. It does not qualify as English.[392]

The problem of how HCFA provides beneficiaries with information about their benefits and the determinations about coverage and payment is intractable and one to which HCFA is not insensitive. HCFA has published a booklet generally describing the Medicare program for beneficiaries[393] and, in July 1984, published a pamphlet (reproduced in Appendix C) outlining appeal rights of beneficiaries regarding hospital insurance claims.[394] However, concerns remain that HCFA's communications with beneficiaries on a variety of matters is inadequate. In its FY 1986 recommendations to the Secretary, ProPAC made a recommendation specifically addressing this concern:

> The Secretary should take immediate action to provide more and better-written information about the Medicare prospective payment system to beneficiaries and providers of care. The Department should work with providers, beneficiaries and associations of these groups to produce and disseminate this information. Associations of providers and beneficiaries should also increase their own efforts to better educate and inform their members about the Medicare prospective payment system.[395]

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[391] Medicare Beneficiary Appeals Process in, Technical Appendixes to the PROPAC Report and Recommendations to the Secretary, April 1, 1986, Appendix C, at 174.

[392] 591 F. Supp. at 1043.

[393] See Health Care Financing Administration, Your Medicare Handbook (Pub. No. HCFA-10050, 1986).

[394] Health Care Financing Administration, Your Right to Appeal Decisions on Hospital Insurance Claims (Pub. No. HCFA-10085, 1984).

[395] ProPac Report and Recommendations to the Secretary, April 1, 1986, at 7 (Recommendation 15: Beneficiary and Provider Information). The American Association of Retired Persons has published an excellent pamphlet on beneficiary rights under the prospective payment system. See American Association of Retired

In responding to this recommendation, HCFA reported that it had worked with beneficiary groups on forms for certain types of information and was preparing another pamphlet on beneficiary appeal rights.[396] Nevertheless, the problem of comprehensible communication to beneficiaries remains a critical issue for the Medicare program.

B. Setting the Price under the Prospective Payment System

Each year HHS is required to publish an informal rule updating the hospital payment rates for the next fiscal year.[397] In updating hospital payment rates under the prospective payment system, HHS is required to consider recommendations of ProPAC and comment on ProPAC's recommendations in the proposed rule on updating the DRG payment rates.[398] Hospitals have charged that, while HHS follows the requisite rulemaking procedures in form including responding diligently to ProPAC recommendations, it does not indicate in the rule how it actually derived the payment rates nor make public the details of the calculations for the payment rates.[399] Specifically, the hospital industry has claimed that HCFA has no analytical basis for the factors it selects to update the payment rates and that its predominant goal in selecting factors is to reduce Medicare expenditures for hospital services rather than to set a fair price.[400] In its comments to the regulations updating the DRG prices for FY 1987, the American Hospital Association stated:

> In our response to the FFY 1986 [sic.] proposed rule on PPS, AHA commented that "the Health Care Financing Administration (HCFA) has an obligation to the public to do more in the Notice than provide a statement of those beliefs that form the basis for the rule; HCFA must provide evidence which validates their beliefs." For a second year, the notice of proposed rates fails to document the appropriateness and validity of the update factor and other changes. Absent detailed evidence, AHA must assume that the primary motivating factor in the development of each component of the

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Persons, Medicare's Prospective Payment System - Knowing Your Rights (1985).

[396] 51 Fed. Reg. 19,970, at 19,998 (1986).

[397] *See* notes 171-176 *supra* and accompanying text.

[398] See notes 177-187 *supra* accompanying text.

[399] Letter from Jack Owen, Executive Vice President of the American Hospital Association, to William Roper, M.D. Administrator of the Health Care Financing Administration (July 3, 1986) (comments on Proposed PPS Rules for FY 1987).

[400] *Id.* at Attachment A.

> rate calculation is budget reduction. We can only conclude that HCFA is not truly interested in the adequacy of the rates that are promulgated, the equity of payments to hospitals or the administration of the Medicare program in a manner that reflects its responsibilities to Medicare beneficiaries and providers. If these issues had been considered in the development of the PPS rates for FY 1987, the update factor and other modifications identified by HCFA would be better documented by quantitative and qualitative evidence of the adjustments and their appropriate levels.[401]

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[401] Id. at 3. The actions of HHS in its handling of the statutory directive that HCFA create an adjustment to reflect the higher costs of hospitals serving a disproportionate share of Medicare and low income patients gives some support to the concerns about HHS' motives in setting the rates under the prospective payment system. See Social Security Act § 1886(d)(5)(C)(i), 42 U.S.C. § 1395ww(d)(5)(C)(i) (1982 ed., Supp. II). HCFA has consistently maintained that hospitals with a high volume of Medicare and low income patients do not experience justifiably higher Medicare costs and thus a special adjustment in the rate is not warranted for these hospitals. Preamble to Proposed Rule, 48 Fed. Reg. at 39,783 (1983). HHS refused to develop such an adjustment despite ProPAC recommendations to do so in its 1985 and 1986 reports to the Secretary (ProPAC Report and Recommendations to the Secretary, April 1, 1985, at 37 (Recommendation 14); ProPAC Report and Recommendations to the Secretary, April 1, 1986, at 37 (Recommendation 9)) and the directives of several courts to do so. See, e.g., Redbud Hospital District v. Heckler, [1984-2 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 34,085 (C.D. Cal. Jul. 30, 1984), application for stay of preliminary injunction granted, 106 S. Ct. 1 (1985) (J. Rehnquist sitting as Circuit Judge); Samaritan Health Center v. Heckler [1986-1 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 34,862 (D.D.C. Aug. 28, 1985). In Samaritan Health Center, the court ruled that HHS had discretion to implement the allowance for disproportionate share hospitals but suggested that HHS may have abused its discretion in this instance. In the Deficit Reduction Act of 1984, Congress mandated HHS to establish an allowance and publish a definition of disproportionate share hospitals by December 31, 1985. Deficit Reduction Act of 1984 § 2315(h)(1) (1984). HCFA developed the requisite definition but only 108 hospitals in the nation qualified and no adjustment was allowed even for those hospitals. 50 Fed. Reg. 53,398 (1985). Questions have been raised whether HHS has really cooperated with the statutory mandate with respect to this issue, given that Congress has originally contemplated that this allowance be available to large urban public or voluntary hospitals as well as poor rural hospitals serving large proportions of aged and poor and the hospitals selected by HCFA were not of this character. See H.R. Rep. No. 5, 98th Cong., 1st Sess. (1983); S. Rep. No. 23, 98th Cong., 1st Sess. (1983); H.R. Rep. No. 47, 98th Cong., 1st Sess. (1983). Congress finally rejected HHS's disposition of this issue in COBRA in which it provided that disproportionate share hospitals, defined according to the proportion of revenue from the Medicare and Medicaid programs, will receive additional payments under the prospective payment system. Consolidated Omnibus Budget Reconciliation Act of 1986 § 9105, amending Social Security Act § 1886(d)(5); 42 U.S.C. § 1395ww(d)(5) (1982 ed., Supp. II).

Finally, HHS has not, for the most part, adopted the recommendations of ProPAC on the methodology to use for updating the hospital payment rate and nearly always uses a methodology that results in a lower payment rate.[402] HHS's refusal to follow ProPAC's recommendations and to update the payment rates and recalibrate DRGs in a manner that results in lower payments has led some in the hospital industry to question ProPAC's effectiveness in influencing the Medicare hospital rate setting process.[403]

In its comments on the HHS proposed rule on updating the FY 1987 payment rates, ProPAC asserted that the approach of HHS and ProPAC on updating the Medicare prospective payment system are "diverging in significant ways" and that this divergence appeared to be based on a "difference in philosophy between the Commission and the Department."[404] ProPAC explained this difference in philosophy as ProPAC's believing that the prospective payment system "should be a flexible and evolutionary system responsive to changing health technology and practice patterns and to the distributional impacts of payments within the system" and that adjustments in the system are "critical to maintaining an environment which fosters innovation and scientific advancement."[405] HHS, in relying on averaging methodologies and ignoring adjustments in the payment system to reflect special circumstances, does not advance the aforementioned goals. ProPAC commented further on HHS responses to ProPAC's recommendations:

> ProPAC was established by the Congress to provide independent advice and oversight on a new, untried prospective payment system. From the beginning, we have strived to make our decision-making analytically based, with careful consideration to a wide range of options on every topic which we review. We do not believe that the Secretary's response to our recommendations always gives full consideration to the detail and extent of the problems we have identified. We also do not believe that the response exhibits the flexibility which we believe is necessary to update and maintain the system. In order to encourage the confidence of beneficiaries, providers, suppliers, and taxpayers, we hope that the Secretary will reconsider the details of our

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[402] See notes 188-191 supra and accompanying text.

[403] See Firshein, ProPAC Weakened by Concern Over Federal Deficit, Hospitals, Apr. 5, 1986, at 24.

[404] Letter from Stuart H. Altman, Ph.D., Chairman of the Prospective Payment Assessment Commission, to William L. Roper, M.D., Administrator of the Health Care Financing Administration (July 2, 1986) (comments of the Prospective Payment Assessment Commission on the Notice of Proposed Rulemaking of June 3, 1986, Concerning Fiscal Year 1987 Changes in the Inpatient Hospital Prospective Payment System).

[405] Id.

> analysis in developing the final fiscal year 1987 PPS regulations.[406]

As noted above, Congress has overridden HHS's recommendations on the update factors for hospital payment rates in FY 1986, and there is some indication that it might do so again for FY 1987 and FY 1988.[407] With respect to Congress' perception of HHS's performance in updating hospital payment rates and the need for remedial action, the House Budget Committee stated:

> The Committee has given, in the past, a significant amount of discretion to the Secretary of Health and Human Services in developing the annual update factor for hospital payments under the medicare [sic] program. The statutory language requires that hospital payments reflect the amounts necessary for the efficient delivery of medically appropriate and necessary care of high quality.

The Committee has, however, for the last two years overridden the Administration's recommended update factor. The Committee finds itself in the same situation once again this year as it finds the Secretary's recommended FY 1987 update factor unacceptable. The Committee concludes that the Administration, in developing the update factor for fiscal year 1987 used factors other than those originally anticipated in the legislation.[408]

HHS's unresponsiveness to ProPAC recommendations and its failure to explain the basis on which it updates the prospective payment rates is quite serious, particularly given the fact that hospitals are expressly precluded from challenging the DRG's or the methodology for their recalibration through administrative or judicial review.[409] Congress intended that ProPAC would serve as a check to HHS in setting DRG's payment rates and recalibrating DRG's and would protect the legitimate interest of hospitals in a fair payment rate. ProPAC has provided Congress with sophisticated analysis of hospital payment rates on which Congress has based its legislative action overriding HHS's recommendations on updating hospital payment rates.

D. Implementation of the PRO Program

Another, quite different, problem is the manner in which HCFA has implemented the PRO program. This major new program, as discussed above, was authorized by the Peer Review Improvement Act of 1982.[410] Congress had required all hospitals to have contracts with PROs by October 1984 to permit conduct of the requisite medical reviews required for monitoring the prospective payment system.[411] Although the President signed the Peer Review Improvement Act in September 1982, HCFA did not publish a notice of the preliminary version of the request for proposals for the contracts from organizations seeking to become PROs until August 29, 1983,[412] and did not promulgate final regulations for the program until April 1985.[413] HCFA has relied almost exclusively on program directives and provisions of the PRO contracts to implement the PRO program.[414] The PRO regulations did not address all implementation procedures and issues[415] and, indeed, as the United States District Court for the District of Columbia observed, the regulations "haphazardly touch on an incomplete and disparate selection of PRO procedures."[416]

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[406] Id.

[407] See notes 190-191 supra and accompanying text.

[408] H.R. Rep. No. 727, 99th Cong., 2d Sess. 427 (1986).

[409] See notes 544-549 infra and accompanying text.

The hospital industry has been quite concerned about the procedures HCFA has followed for the implementation of the PRO program since the inception of the program in 1982, particularly when HCFA began the contracting process without having promulgated any regulations to implement the program. In October 1984, the American Hospital Association filed a petition for rulemaking with HCFA under

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[410] See notes 120-137 supra and accompanying text.

[411] See notes 192-197 supra and accompanying text.

[412] 48 Fed. Reg. 39,160 83 (1983). The final RFP was not issued until February 29, 1984. No final version of the scope of work of the RFP was published in the Federal Register.

[413] 50 Fed. Reg. 15,312 et seq. (1986) (codified in scattered sections of Title 42, Code of Federal Regulations).

[414] See PRO Manual IM 85-2 replacing PSRO transmittal No. 107; PRO Manual IM 85-3 replacing PSRO Transmittal No. 108; Medicare Hospital Transmittal No. 367, § 287.4a; and Medicare Intermediary Manual Transmittal No. 1079, § 3789c & No. 1102; PRO Directive No. 2. Health Care Financing Administration, Request for Proposals for PRO Contracts, (RFP No. HCFA-84-015 Feb. 29, 1984).

[415] See 42 C.F.R. 412.42 et seq. (1986).

[416] American Hospital Asssociation v. Bowen, No. 85-0311, Slip op. at 4 (D.D.C. May 30, 1986).

§ 553(e) of the Administrative Procedure Act.[417] When the Secretary did not act on the petition, the American Hospital Association brought suit in the United States District Court for the District of Columbia alleging that HCFA had violated certain procedural and substantive rights of hospitals by implementing provisions of the PRO program without adhering to the rulemaking procedures of the Administrative Procedure Act and in refusing the petition for rulemaking.[418]

On May 30, 1986, the United States District Court for the District of Columbia, in American Hospital Association v. Bowen, ruled that most of the program directives through which HCFA had implemented the PRO program were actually substantive rules and thus invalid because not promulgated pursuant to the informal rulemaking procedures of the Administrative Procedure Act. The court also ruled that HCFA's denial of the American Hospital Association's petition for rulemaking was arbitrary and capricious. This decision has wrought considerable confusion in the PRO program and jeopardizes the PRO's important function of monitoring hospital performance in delivering high quality services to Medicare beneficiaries in a cost-effective manner. Also, as noted above, Congress has exhibited considerable dissatisfaction with the implementation of the PRO program generally and has made several substantive changes in past legislation and is now considering proposals for additional changes.[419]

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[417] Petition before the Department of Health and Human Services for Rulemaking of the American Hospital Association for Promulgation of Regulations Implementing the Peer Review Improvement Act of 1982 (Oct. 10, 1984).

[418] See American Hospital Association v. Bowen, No. 85-0311 (D.D.C. May 30, 1986).

[419] See notes 135-137 supra and accompanying text.

CHAPTER V: ADMINISTRATIVE HEARING ISSUES

This chapter discusses concerns about administrative hearing procedures for disputes over coverage and payment determinations under the Medicare program. These problems are diverse but all involve whether the various hearing processes in the Medicare appeals system protect the right of beneficiaries and providers to procedural due process of law. The Supreme Court has interpreted the due process clause of the fifth amendment to require that when a government action affects the entitlement interest of beneficiaries in a federal program, then the agency must follow appropriate procedures to ensure that the beneficiary is properly notified of the proposed government action and has an opportunity to contest the action in a meaningful fashion.[420] The Supreme Court has established that beneficiaries clearly have an entitlement interest in the Medicare program subject to protection under the due process clause in its 1980 decision, O'Bannon v. Town Court Nursing Center.[421] This case also established that providers do not have a comparable entitlement interest in the Medicare program.[422]

A. Beneficiary Coverage Appeals Under Part A

Since the inception of the Medicare program, beneficiaries have brought numerous appeals of which the great majority have involved coverage determinations based on medical criteria. In addition to a few cases challenging whether certain services or procedures are covered benefits under Part A or Part B of the Medicare program, as in Heckler v. Ringer,[423] most beneficiary appeals have involved questions of whether specific services are covered benefits according to medical criteria of whether services were medically necessary or constituted custodial care.[424]

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[420] See, e.g., Mathews v. Eldridge, 424 U.S. 319 (1976); Goldberg v. Kelly, 397 U.S. 254 (1970). See generally Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267 (1975).

[421] 447 U.S. 773 (1980); Gray Panthers v. Schweiker, 652 F.2d 146 (D.C. Cir. 1980).

[422] Id. See also St. Francis Hospital Center v. Heckler, 714 F.2d 872 (7th Cir.) cert. denied, 465 U.S. 1022 (1984); Geriatrics, Inc. v. Harris, 640 F.2d 262 (10th Cir.), cert. denied, 454 U.S. 832 (1981).

[423] 466 U.S. 602 (1984).

[424] See, e.g., Hultzman v. Weinberger, 495 F.2d 1276 (3d Cir. 1974); Weir v. Richardson, 343 F. Supp. 353 (S.D. Iowa 1972); Reading v. Richardson, 339 F. Supp. 295 (E.D. Mo 1972); Johnson v. Richardson, 336 F. Supp. 390 (E.D. Pa 1971);

Beneficiaries have some complaints about administrative review by Administrative Law Judges (ALJ's) and the Appeals Council of the Social Security Administration and there have been some suggestions, including from Congress, that the administrative appeals system for Medicare appeals as well as the appeals system for all appeals arising under the Social Security Act be restructured.[425] However, since many of the complaints of Medicare beneficiaries are similar to those of beneficiaries of other Social Security programs and since the American Bar Association with input from the Administrative Conference of the United States has developed recommendations for modifications of these procedures in another context,[426] they will not be addressed in this report.
Nevertheless, there are currently some reported problems with beneficiary appeals

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Sowell v. Richardson, 319 F. Supp. 689 (D.S.C. 1970). *See* Butler, *Advocate's Guide*, *supra* note 227, at 337-842.

[425] See note 1 *supra* and accompanying text.

[426] See Case Western Reserve School of Law, *Symposium on Federal Disability Programs: Report and Recommendations* (Oct. 1985) (cosponsors of the conference that developed this report include the Administrative Conference of the United States and the American Bar Association)

Of special concern to Medicare beneficiaries, shared by other Social Security program beneficiaries, is the conduct of the Appeals Council in the SSA's Office of Hearings and Appeals. Under HHS regulations, the SSA Appeals Council is authorized to reopen cases after their disposition by the ALJ. The Appeals Council had been reopening cases despite another regulatory provision specifically governing when the Appeals Council may initiate review, i.e., any time within 60 days of the hearing decision or dismissal. 20 C.F.R. § 404.969 (1986). This has caused considerable unpredictability in the beneficiary appeals system since the Appeals Council has often initiated review several months after an ALJ decision.

Medicare and Social Security beneficiaries have challenged this practice on numerous occasions, and several federal district court decisions have ruled that the Appeals Council practice is contrary to the regulations, in spite of the deference customarily given the Secretary in interpreting his own regulations. *See, e.g.*, Munsinger v. Schweiker, 709 F.2d 1212 (8th Cir. 1983); McCuin v. Bowen, [1986-2 Transfer Binder] *Medicare & Medicaid Guide (CCH)* ¶ 35,443 (D.N.H. Apr. 23, 1986); Dion v. Secretary of Health and Human Services, No. 83-442-D (D.N.H. Apr. 25, 1985): Silvis v. Heckler, 578 F. Supp. 1401 (W.D. Pa. 1984). These cases concluded that the Appeals Council's right to reopen cases is governed by 20 C.F.R. § 404.969 (1986) which authorizes reopening within 60 days of the ALJ's decision and that the regulations authorizing reopening thereafter apply only to beneficiaries' requests to reopen. 20 C.F.R. § 404.988-.989 (1986). One circuit court of appeals decision, *Munsinger v. Schweiker*, has upheld the Appeals Council interpretation of this regulation.

under Part A that warrant attention here: (1) problems with beneficiary appeals of hospital benefits under the prospective payment system; (2) complaints about the HCFA policy prohibiting providers from representing beneficiaries in appeals under Part A because of a conflict of interest; and (3) deficiencies in appeal procedures for claims under $100.

1. Beneficiary Appeals Under the Prospective Payment System

As might be expected with the implementation of any major nationwide program affecting millions of people and thousands of institutions, there have been unanticipated ramifications causing problems for individuals and institutions involved. But in the case of the prospective payment system, these problems have been remarkably few given the size and complexity of this program.

Informing Beneficiaries About Appeal Rights. Soon after the implementation of the prospective payment system, reports surfaced, generating congressional and other investigations, that hospitals were discharging Medicare patients early and inappropriately, i.e., "sicker and quicker," and often against their will with the explanation that the beneficiary's covered Medicare days had "run out."[427] Further, reports indicated that beneficiaries often did not appeal such decisions because they were unaware of their right to appeal what appeared to be decisions of hospital management or attending physicians and they also would be liable for the continued stay once they had been notified that continued hospitalization was no longer necessary.[428]

Congress and HCFA took immediate steps to address this problem. Working with consumer groups, HCFA developed a notice for hospitals to give all Medicare patients upon admission that would clearly explain the patient's appeal rights with respect to any decision by the hospital, the patient's physician or the PRO about the patient's continued stay.[429] (A copy of this notice is in Appendix C.) Further, in its 1986 recommendations to the Secretary, ProPAC urged the Secretary to require hospitals to give beneficiaries immediate notice of appeal rights upon admission and also to improve the information available to beneficiaries about appeals and their rights under the prospective payment system.[430]

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[427] Senate Special Comm. on Aging, Hearings on Quality of Care under Medicare's Prospective Payment System; Technical Appendixes to the ProPAC Report and Recommendations to the Secretary, April 1, 1986, Appendix C, at 149-50; Government Accounting Office, Information Requirements for Evaluating the Impacts of Medicare Prospective Payment on Post-Hospital Long-Term-Care Services: Preliminary Report, (PEMD-85-8, Feb. 21, 1985).

[428] Social Security Act § 1879, 42 U.S.C. § 1395pp (1982 ed., Supp. II); 42 C.F.R. § 405.330-.332 (1986). This is not really a new problem but, rather, hospitals have always been able to make implicit decisions about the Medicare coverage of continued hospitalization through the utilization review process without input from the affected patient and with an after-the-fact appeal to the PSRO to challenge the decision that continued stay was no longer necessary. The major difference under the prospective payment system is that now hospitals have a very strong financial incentive to make these implicit coverage decisions. See Price, Katz, Provence, An Advocate's Guide to Utilization Review, 9 Clearinghouse Rev. 307 (1977); Neely-Kvarme, Administrative and Judicial Review of Medicare Issues: A Guide Through the Maze, 57 Notre Dame Law. 1 (1981), 9-16.

ProPAC also conducted a brief study which suggested that this was not a widespread problem.[431] However, despite this reassuring ProPAC study, there is convincing evidence reported in surveys conducted by the American Society of Internal Medicine[432] and the American Medical Association[433] that premature discharge of Medicare patients is widespread and that the quality of hospital care provided Medicare patients is declining.[434] Congress continues to be concerned about this issue as evidenced by the bill Senator Durenberger introduced in this session of Congress, the Medicare Quality Protection Act, which would require improved appeals procedures in this area.[435] The House and Senate budget bills contain provisions to improve PRO appeals procedures in this area which would give a beneficiary a statutory right to appeal a hospital discharge notice to a PRO and ensure that the beneficiary is not financially liable for a continued stay until after receiving notice of the PRO's decision.[436]

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[429] 51 Fed. Reg. 19,970, 19,998 (1986) (proposed rule).

[430] Technical Appendixes to the ProPAC Report and Recommendations to the Secretary, April 1, 1986, Appendix C, at 162.

HCFA agreed with ProPAC about the need to address beneficiaries' concerns regarding getting better information about the prospective payment system and, specifically, about appeal rights. 51 Fed. Reg. at 19,998 (1986). HCFA noted that it had released a notice for Medicare beneficiaries to be given to them upon admission to the hospital which would explain beneficiaries' rights to appeal and reconsideration more specifically. Id. HCFA also stated that it was publishing a pamphlet on beneficiary appeal rights. Id.

[431] Beneficiary and Professional Perception of PPS Quality of Care in Technical Appendixes to the ProPAC Report and Recommendations to the Secretary, April 1, 1986, Appendix C, at 147.

[432] American Society of Internal Medicine, The Impact of DRG's on Patient Care: A survey by the American Society of Internal Medicine March 1984-October 1985 (undated).

[433] American Medical Association, Report of the American Medical Association Board of Trustees: AMA's DRG Monitoring Project and the Prospective Payment System (Dec. 1985).

[434] See also, Senate Special Comm. on Aging, Hearings on Quality of Care under Medicare's Prospective Payment System, at 1-2.

PRO Appeal Procedures. PROs have the major responsibility for handling the first stage of the appeals of their coverage determinations under the prospective payment system - the reconsideration of any initial coverage denial.[437] HCFA has published no standards for PRO reconsideration procedures, and there are reports that many PROs have refused to implement such standards or fully understand their adjudicative responsibilities.[438] HCFA has no specific information on the volume of PRO appeals for either hospitals or beneficiaries to date.[439] There is concern about the ability of PROs to handle these appeals in a fair and expeditious manner.[440] This is an especially troubling situation for hospitals in view of the fact that, as discussed below, reconsideration decisions in provider appeals are not subject to administrative or judicial review.[441]

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[435] S. 2331, Medicare Quality Protection Act of 1986, 99th Cong., 2d Sess. (1986).

[436] H.R. 5300, § 10241(a), 99th Cong., 2d. Sess. (1986), S. 2706, 3604, 99th Cong., 2d. Sess. (1986). See also H. Rep. No. 727, 99th Cong., 2d Sess. 457 (1986); S. Rep. No. 348, 99th Cong., 2d Sess. 146 (1986).

[437] See notes 237-243 supra and accompanying text.

[438] Senate Finance Comm. Hearings on Medicare Appeals Provisions, at 151 (statement of the American Hospital Association). See also Wilson, How to Appeal Medicare Hospital Coverage Denials under the DRG System, 20 Clearinghouse Rev. 434 (1986).

[439] Letter from Joseph J. Hladky, Director, Office of Medical Review, Health Standard and Quality Bureau, Health Care Financing Administration, to Eleanor D. Kinney, Assistant Professor of Law, Indiana University (Oct. 6, 1986).

[440] Wilson, How to Appeal Medicare Hospital Coverage Denials Under the DRG System, supra note 438.

2. Provider Representation of Beneficiaries in Appeals Under Part A

In the past, hospitals, home health agencies and skilled nursing facilities have often represented beneficiaries in their appeals of coverage issues arising under Part A. In January 1984, HCFA issued instructions[442] prohibiting providers from representing beneficiaries in coverage appeals, despite an explicit regulation authorizing beneficiaries to be represented by any person not prohibited by law.[443] HCFA argues that providers have a conflict of interest in these appeals and past experience demonstrates that providers have gotten reluctant beneficiaries to file appeals because of the provider's financial liability for the services in question.[444] HCFA is also concerned, as stated in manual transmittals, that allowing providers to represent beneficiaries creates an alternative appeals avenue for providers not permitted by statute.[445]

This policy raised considerable objections among providers who are generally financially responsible for the services for which coverage is denied.[446] Last year's House budget reconciliation bill included a provision overruling this policy and allowing provider representation of beneficiaries in appeals,[447] although the budget bills for FY 1987 do not contain comparable provisions.

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[441] See notes 555-559 infra and accompanying text.

[442] Medicare Intermediary Manual Transmittal No. 1079, codified in, Medicine Intermediary Manual (HIM-11) § 3789(c); Hospital Manual Transmittal No. 367, codified in, Hospital Manual (HIM-10) § 287.4A; Home Health Agency Manual Transmittal No. 150, codified in, Home Health Agency Manual (HIM-11) § 257.A.1.

[443] 20 C.F.R. § 404.1705(b) (1986).

[444] Senate Finance Comm. Hearings on Medicare Appeals Provisions at 51 (statement of Henry R. Desmarais, M.D., Acting Deputy Administrator, Health Care Financing Administration).

[445] Intermediary Manual Transmittal No. 1079, at 3-262; Medicare Hospital Manual Transmittal No. 367, at 4861.

[446] See Senate Finance Comm. Hearings on Medicare Appeals Provisions at 147.

The United States District Court for the District of Columbia, in American Hospital Association v. Bowen, ruled more recently that these policies pertaining to hospital benefits were valid interpretative rules and need not be promulgated as regulations under the Administrative Procedure Act.[448] However, the United States District Court in Home Health Care, Inc. v. Bowen[449] ruled that a similar proscription against home health agencies representing beneficiaries in coverage disputes[450] constituted a substantive rule that should have been promulgated pursuant to the informal rulemaking procedures of the Administrative Procedure Act and was therefore invalid. Regarding HCFA's arguments raising the potential conflict of interest between provider and beneficiary, the court stated:

> It may well be that prohibiting providers of Medicare services from representing Medicare beneficiaries is warranted. Such a provision, however, should only be adopted after interested parties have had the opportunity to consider the proposed change and comment on it. There are two Medicare beneficiaries in the present case ably represented by knowledgeable counsel who do not believe a conflict exists between them and their providers and who persuasively argue that potential conflicts would not be pervasive generally. Perhaps they and others similarly situated can articulate to the Secretary the bases for their views and may indeed persuade the Secretary to eliminate entirely or, at least, narrow the broad disqualification.[451]

The court distinguised its earlier decision in American Hospital Association v.

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[447] See notes 347-348 supra and accompanying text.

[448] No. 85-0311, slip op. at 21-23.

[449] No. 84-0957 (D.D.C. Jul. 15, 1986).

[450] Home Health Agency Manual Transmittal No. 150, codified in, Home Health Agency Manual (HIM-11) § 257.A.1.

[451] No. 84-0957, slip op. at 7-8.

Bowen on grounds that individual beneficiaries appeared in this case and not in the American Hospital Association case.[452]

3. Deficiencies in Appeal Procedures for Claims Under $100

As noted above, there is no administrative or judicial review of claims under $100. In Gray Panthers v. Schweiker, beneficiary groups alleged that the intermediary hearing procedures for Part A as well as Part B claims under $100 were inadequate and violated beneficiaries' rights to procedural due process.[453] The United States Court of Appeals for the District of Columbia Circuit agreed, ruling that more than a "paper" hearing on small Part A claims was required although an oral hearing was necessary only in the few cases where factual issues involving the credibility or veracity of the claimant are at stake.

In reviewing the district court's action, the Court of Appeals in Gray Panthers II[454] ruled that "adoption of procedures allowing for oral hearings is not warranted" if the total number of cases requiring an oral hearing is small[455] Taking this cue along with testimony of HCFA officials that there are annually only about 100 Part A reconsideration claims under $100, the district court ruled that oral hearings were not required for small claims under Part A.[456] Concluding further that the Part A notices of coverage determination were "not perfect, but more than adequate," the court ordered no changes in these notices.[457]

B. Provider Payment Disputes Under Part A

Since the inception of the Medicare program, providers have often appealed intermediary payment determinations. Early in the program, skilled nursing facilities brought a large volume of appeals which tapered off as HHS imposed stricter interpretations of the skilled nursing benefit and Medicare utilization of skilled nursing facilities dropped accordingly.[458] Hospital challenges to Medicare payment policies have been extensive since the 1970s, particularly with the advent of orchestrated group appeals by state hospital associations and the American Hospital Association.[459] These challenges have chiefly concerned specific methodologies HCFA has used to calculate cost reimbursement. The two outstanding cost reimbursement policies of current interest are (1) how to account for labor and delivery room patient days in determining Medicare reimbursement,[460] and (2) HCFA's methodology for calculating Medicare's portion of the cost of a hospital's malpractice insurance.[461]

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[452] No. 84-0957, slip op. at 8 n. 8.

[453] See notes 504-509 infra and accompanying text.

[454] 716 F.2d 23 (D.C. Cir. 1983).

[455] Id. at 36.

[456] [1986-1 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 35,140 (D.D.C. Feb. 14, 1986).

[457] Id.

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[458] See note 229-230 _supra_ and accompanying text.

[459] _See_ Special Issue, _Medicare Reimbursement Is Examined by AHA's Group Appeals_ Health L. Vigil, Feb. 4, 1983.

[460] HCFA requires that patients in the labor and delivery room area be included in the inpatient census for purposes of determining the number of Medicare patient days but excludes the costs of labor and delivery room services from the total costs Medicare recognizes for reimbursement purposes. _See_ 42 C.F.R. § 405.452(b) (1986); Provider Reimbursement Manual (HIM-15) § 2345. Hospitals claim that this policy understates the number of Medicare patient days and results in lower Medicare reimbursement. Several courts have agreed with hospital challenges to this policy. _See_ Community Hospital of Roanoke Valley v. Health and Human Services, 770 F.2d 1257 (4th Cir. 1985); Central DuPage Hospital v. Heckler, 761 F.2d 354 (7th Cir. 1985); St. Mary of Nazareth Hospital Center v. Heckler, 760 F.2d 1311 (D.C. Cir. 1985), _aff'g_ 587 F. Supp. 937 (D.D.C. 1984), _after remand sub nom. in_, St. Mary of Nazareth Hospital Center v. Schweiker, 718 F.2d 459 (D.C. Cir. 1983); Mt. Zion Hospital and Medical Center v. Heckler, 758 F.2d 1346 (9th Cir. 1985); Beth Israel Hospital v. Heckler, 734 F.2d 90 (1st Cir. 1984); Baylor University Medical Center v. Heckler, 730 F.2d 391 (5th Cir. 1984).

[461] Prior to 1979, Medicare treated a hospital's medical malpractice insurance costs like most other costs and reimbursed the hospital according to the proportionate share of Medicare utilization. In 1979, HCFA adopted another method for calculating Medicare's portion of malpractice insurance costs which resulted in marked reductions in reimbursement for this cost item. 42 C.F.R. § 405.452(b)(1)(ii) (1986). Several courts of appeal have invalidated this rule. _See, e.g._, Cumberland Medical Center v. Secretary of HHS, 781 F.2d 536 (6th Cir. 1986); DeSoto General Hospital v. Heckler, 766 F.2d 182, _as amended at_, 776 F.2d 115 (5th cir. 1985); Bedford County Memorial Hospital v. Heckler, 769 F.2d 1017 (4th Cir. 1985); Menorah Medical Center v. Heckler 768 F.2d 292 (8th Cir. 1985); Lloyd Noland Hospital and Clinic v. Heckler, 762 F.2d 1561 (11th Cir. 1985); St. James Hospital v. Heckler, 760 F.2d 1460 (7th Cir. 1985), _cert. denied_, ____ U.S. ____, 106 S. Ct. 229 (1985); Humana of Aurora, Inc. v. Heckler, 753 F.2d 1579 (10th Cir. 1985), _cert. denied_, ____ U.S. ____, 106 S. Ct. 180 (1985); Abington

The implementation of the cost per case and target rate of increase limits under the Tax Equity and Fiscal Responsibility Act and then the prospective payment system have generated more litigation. The substantive issues for these hospital appeals fall into three categories: (1) challenges to HCFA's calculation of the hospital's base year costs used to calculate the hospital-specific portion of the standardized amount during the transition period;[462] (2) challenges to specific factors used to calculate the federal portion of the standardized amount that pertain directly to hospitals, e.g., the methodology for classifying urban and rural hospitals;[463] and (3) exemptions and adjustments for hospitals with special needs and characteristics.[464]

There are currently five important issues regarding provider appeals of current concern: (1) what constitutes a final intermediary decision for purposes of triggering PRRB jurisdiction to hear hospital appeals under the prospective payment system; (2) whether HCFA can correct an error in the determination of a hospital's base year costs and resulting errors in payment under the prospective payment rate on a prospective basis only; (3) HCFA's policy of not abiding by decisions of federal courts of appeals that rule in favor of providers even with respect to cases in the same circuit; (4) concerns about procedures before the PRRB; and (5) hospital waiver of liability appeals.

1. Jurisdiction of the PRRB for Hospital Appeals Under the Prospective Payment System

Since the implementation of the prospective payment system, many hospitals have challenged the intermediary's calculation of their base year costs for purposes of determining the hospital-specific portion of the prospective payment

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Memorial Hospital v. Heckler, 750 F.2d 242 (3d Cir. 1984), cert. denied, ____ U.S. ____, 106 S. Ct. 180 (1985). See also Walter O. Boswell Memorial Hospital v. Heckler, 749 F.2d 788 (D.C. Cir. 1984), on remand, 628 F. Supp. 1211 (D. Colo. 1985). On April 1, 1986, the Secretary issued an interim final rule modifying its procedures for calculating malpractice insurance costs which still treats these costs differently than other costs for Medicare reimbursement purposes. 51 Fed. Reg. 11142 (1986).

[462] See notes 465-478 infra and accompanying text.

[463] See, e.g., Good Samaritan Medical Center v. Heckler, 605 F. Supp. 19 (S.D. Ohio 1984).

[464] See, e.g., Community Hospital of Indianapolis, Inc. v. Schweiker, 717 F.2d 372 (7th Cir. 1983); Redbud Hospital District v. Heckler [1984-2 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 34,085 (N.D. Cal. July 30, 1984).

rate.[465] Interpreting the phrase in § 1878(a)(1)(A), "a final determination of the Secretary as to the amount of payment,"[466] the PRRB initially acknowledged jurisdiction over appeals of base year cost issues where the hospital had received a "Final Notice of Base Period Cost and Target Amount per Discharge" from the intermediary.[467] In May 1984, the Secretary issued HCFAR-84-1 reversing the PRRB's position that it had jurisdiction in these cases and ruling that the PRRB cannot assume jurisdiction over such determinations until the end of the cost reporting period and the intermediary has issued a final Notice of Program Reimbursement (NPR) for that year[468] -- an event that generally occurs more than a year after the end of the cost reporting year. Thus, this policy significantly postpones the time when errors in the calculation of the hospital-specific portion of the prospective payment rate can be appealed.

Many hospitals have challenged this HCFA ruling judicially. The United States District Court for the District of Columbia consolidated its cases on this issue in Tucson Medical Center v. Heckler, granted summary judgment for the hospitals and ordered the requested relief.[469] On July 8, 1986, in Washington Hospital Center v. Bowen,[470] the United States Court of Appeals for the District of Columbia Circuit affirmed the district court's decision in Tucson Medical Center. In an extensive analysis of the statutory provisions in § 1878 and § 1886 as well as the legislative history, Judge Wald concluded that:

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[465] See note 160 supra.

[466] Social Security Act § 1878(a)(1)(A), 42 U.S.C. § 1395oo(a)(1)(A) (1982 ed., Supp. II).

[467] HCFA interprets the phrase "final determination of the Secretary" in § 1878(a) of the Social Security Act to mean the intermediary's final determination of the total amount of payment due the hospital for the cost reporting period at issue. 42 C.F.R. § 405.1801(a)(1)(ii) and (iii) (1986). By regulation, the intermediary must provide a hospital with a notice of program reimbursement (NPR) reporting final payment for each annual cost reporting period. Id. at § 405.1803.

[468] HCFAR-84-1, 49 Fed. Reg. 2241 (1984).

[469] 611 F. Supp. 823 (D.D.C. 1985), aff'd, Washington Hospital Center v. Bowen, No. 85-5907 (D.C. Cir. July 8, 1986).

[470] No. 85-5907 (D.C. Cir. Jul. 8, 1986).

> The effect of the new language in the opening paragraph of § 1395oo(a), contrary to the Secretary's interpretation, is to eliminate the requirement that PPS recipients file a cost report prior to appeal.[471]

The court was persuaded that Congress recognized that the prospective payment system established a final price per case before payment rather than paying hospitals retrospectively and thus had modified its jurisdictional requirements in § 1878(a)(1) for appeals of the hospital-specific portion of the prospective payment rate. Washington Hospital Center v. Bowen is a definitive decision on this issue that will be difficult for HHS to get a reviewing court to overturn. This decision is in accord with the decisions of twelve other cases ruling against the HCFA's position on this issue.[472]

2. Retrospective Correction of Errors in Prospective Payment Rates

HCFA regulations provide that the intermediary's determination of the base year costs for calculating payment under the prospective payment system is "final and may not be changed after the first day" of the hospital's first year under the system except if the provider wins a final judicial or administrative decision for its base year.[473] In such event, the regulations provide that the intermediary may recalculate the base year costs and the Medicare payments for years after the administrative or judicial decision but not for prior years.[474]

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[471] No. 85-5907, slip op. at 13.

[472] See, e.g., Greenville Hospital System v. Heckler, No. 85-1860 (4th Cir. Dec. 18, 1985) [1986-1 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 34,832 (D.S.C. July 19, 1985); City of Lincoln v. Heckler, No. CV85-L-338 (D. Neb. Dec. 26, 1985); Southeastern Palm Beach County Hospital District v. Heckler, [1986-1 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 35,047 (S.D. Fla. Nov. 26, 1985); North Broward Hospital District v. Heckler, No. 85-6185-CIV-KING (S.D. Fla. Nov. 8, 1985); Good Samaritan Hospital v. Heckler, No. 84-L-459 (D. Neb. Nov. 1, 1985); St. Francis Hospital v. Heckler, [1986-1 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 34,918 (S.D. W. Va. Sept. 30, 1985); Medical Center Hospital v. Heckler, [1986-1 Transfer Binder] Medicare & Medicaid Guide (CCH), ¶ 34,920 (M.D. Fla. Sept. 23, 1985); Doctors General Hospital, Inc. v. Heckler, 613 F. Supp. 1036 (S.D. Fla. 1985); Sunshine Health Systems, Inc. v. Heckler, [1986-1 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 34,858 (C.D. Cal. April 10, 1985); Charter Medical Corp. v. Heckler, No. C84-116 A (N.D. Ga. March 20, 1985); Redbud Hospital District v. Heckler, [1984-2 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 34,085 (N.D. Cal. July 10, 1984).

[473] 42 C.F.R. § 412.72 (1986).

Changes in the base year costs mandated by an administrative or judicial rule in favor of the fiscal intermediary are made retrospectively.[475] HCFA has justified this policy on grounds that, by statute and legislative history, the fiscal intermediary must make the determination of the initial base year costs on the best available data and, having done so, retrospective recalculation of the base year and payment accordingly is not required.[476]

Hospitals have been quite concerned about this policy because, when combined with the requirement in HCFAR-84-1 that hospitals can only initiate an appeal after receiving an NPR, this policy effectively precludes a hospital from obtaining any financial relief for an intermediary's error in calculating its base year costs.[477] There have been several cases challenging this all of which have ruled in favor of the hospitals.[478]

3. *HHS Non-Acquiescence with Judicial Decisions*

As in other Social Security Act programs,[479] HHS has refused to follow

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[475] *Id.* at § 412.72(a)(4)(ii).

[476] Preamble to Proposed Rule, 49 Fed. Reg. 27422, 27428 (1984). See H. Rep. No. 47, 98th Cong., 1st Sess. 182 (1983) (Congress stated its intent that fiscal intermediaries make this determination using the best available data).

[477] *See* *Senate Finance Comm. Hearings on Medicare Appeals Provisions* at 79 (statement of the Catholic Health Association of America). This statement illustrates the schedule for the intermediary's action on a hospital's cost report and indicates that the notice of program reimbursement is generally issued one year after the hospital files its cost report. It takes another year after issuance of the NPR for the PRRB to decide the case -- nearly four years after the beginning of the cost reporting year at issue.

[478] *See, e.g.*, St. Francis Hospital v. Heckler, [1986-1 Transfer Binder] *Medicare & Medicaid Guide (CCH)* ¶ 34,918 (S.D.W. Va. Sept. 30, 1985); Charter Medical Corp. v. Heckler, 604 F. Supp. 638 (M.D. Ga. 1985).

[479] HHS's non-aquiescence in circuit court of appeals decisions has been a controversial practice, particularly with the Social Security Disability Insurance Program, and has commanded the attention of Congress as well as scholarly commentary. *See* *Judicial Review of Agency Action: HHS Policy of Nonacquiescence: Oversight Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985); National Senior Citizens Law Center, *Steiberger v. Heckler: A Careful Analysis of HHS's Policy of Nonacquiescence*, 19 Clearinghouse Rev. 1165 (1986); Note, *Agency Nonacquiescence: Implementation, Justification, and Acceptability*,

United States Circuit Courts of Appeals decisions favorable to providers in any other case, even those arising in the same circuit. Consequently, hospitals are required to bring separate appeals on issues that have been dispositively decided in favor of providers by a number of courts of appeals. HCFA's actions with respect to court decisions in favor of hospitals on the labor and delivery room day policy is an example of HHS's non-acquiescence policy with respect to the Medicare program.

The American Hospital Association coordinated a group appeal to the PRRB on the labor and delivery room day issue. The PRRB ruled in favor of the hospitals on this issue on August 19, 1980; but, in a decision dated October 17, 1980, the Deputy Administrator reversed the PRRB's decision.[480] The hospitals appealed this decision to the United States District Court for the District of Columbia in order to get a quick and final resolution of this issue in the court to which all hospitals had a right to appeal.[481] In St. Mary of Nazareth Hospital v. Schweiker,[482] the district court affirmed the Deputy Administrator. However, the United States Court of Appeals for the District of Columbia reversed this decision and ruled that the labor and delivery room day policy was arbitrary, capricious and in violation of the Medicare statute.[483] Since that decision, the five other courts of appeals that have heard cases on this issue have rejected the Secretary's policy.[484]

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42 Wash. & Lee L. Rev. 1233 (1985); Kuhl, The Social Security Administration's Nonacquiescence Policy, 4 Det. C.L. Rev. 913 (1984).

[480] PRRB Decision No. 80-D67 (Aug. 19, 1980), rev'd, HCFA Dep. Admin. Dec. (Oct. 17, 1980).

[481] Senate Finance Comm. Hearings on Medicare Appeals Provisions at 88 (statement of the Catholic Health Association of America).

[482] [1981-2 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 31.594 (D.D.C. Nov. 9, 1981).

[483] 718 F.2d 459 (D.C. Cir. 1983).

[484] See, e.g., Community Hospital of Roanoke Valley v. Health and Human Services, 770 F.2d 1257 (4th Cir. 1985); Central DuPage Hospital v. Heckler, 761 F.2d 354 (7th Cir. 1985); Mt. Zion Hospital and Medical Center v. Heckler, 758 F.2d 1346 (9th Cir. 1985); Beth Israel Hospital v. Heckler, 734 F.2d 90 (1st Cir. 1984); Baylor University Medical Center v. Heckler, 730 F.2d 391 (5th Cir. 1984).

Despite these uniform court of appeals decisions continually rejecting various HCFA rationales for this policy, HCFA has refused to abandon this policy even in those circuits where the court of appeals has invalidated the policy. Rather, HCFA requires each individual hospital to challenge the policy and will provide relief only when so ordered by the court of appeals. Further, as in the case of St. Mary of Nazareth Hospital v. Heckler, HCFA accorded relief only for the cost reporting year appealed in the case and not for years before or after.[485] Finally, it should be emphasized that this is not the only Medicare issue where HHS has not acquiesced in a court of appeals decision even with respect to providers in the same circuit. Rather, HHS has followed this non-acquiescence policy in other situations where there has been a favorable court of appeals decision in favor of providers.[486]

4. PRRB Role and Procedures

Over the years, both HCFA and provider groups have raised concerns in three areas about the PRRB and its effectiveness in serving as a credible adjudicator of provider payment disputes: (1) the nature of the PRRB's role in the payment appeals process; (2) the administrative exhaustion requirement when the PRRB has no authority to decide the disputed issue; and (3) specific problems with PRRB hearing procedures. The first area -- the authority and role of the PRRB -- has generated the greatest concern and is the most important, particularly if the PRRB is assigned new adjudicative responsibilities in the future. This concern is also shared by providers, HCFA and the PRRB although for quite different reasons.

The PRRB is an independent tribunal separate from the Medicare program. However, it was never intended to be the final decision-maker on program policy as evidenced by the authority Congress accorded the Secretary to reverse or modify PRRB decisions.[487] Specifically, providers argue that the PRRB is not really independent due to this Secretarial authority. This concern has been aggravated by the HCFA Deputy Administrator's practice of reversing a large proportion of Board decisions in favor of providers.[488] In 1983, HCFA endeavored to address many of these concerns of providers in promulgating regulations stating criteria for when the Deputy Administrator would review and change a PRRB decision and also proscribed ex parte contacts outside of the record by HCFA staff and the Deputy Administrator regarding a PRRB decision.[489]

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[485] See Senate Finance Comm. Hearings on Medicare Appeals Provisions, at 89 (statement of the Catholic Health Association of America).

[486] For example HCFA refused to follow the decision of the United States Court of Appeals for the Fifth Circuit in Presbyterian Hospital of Dallas v. Schweiker, 638 F.2d 1381 (5th Cir. 1981), cert. denied, 454 U.S. 940 (1981), which ruled that the cost of providing free care pursuant to the Hill-Burton hospital construction and survey program constituted an allowable cost for reimbursement purposes under the Medicare program, in the case of other hospitals located in the Fifth Circuit.

[487] Social Security Act § 1878(f), 42 U.S.C. § 1395oo(f) (1982 ed., Supp. II).

HCFA has also indicated dissatisfaction with the PRRB chiefly because it makes decisions beyond the scope of its statutory authority. In its decisions reversing the PRRB, HCFA has stated emphatically that the PRRB has no power to decide the validity of the Medicare statute or regulations.[490] The opinions in these decisions reflect HCFA's perception that the PRRB is generally too sympathetic to providers and does not fully appreciate the statutory and regulatory parameters in which it operates. In many of these PRRB decisions, the PRRB definitely based its decision on an interpretation of the statute and, in one case, the Constitution that differed from the position of HHS.[491]

The PRRB also shares this concern about its independence but from a radically different perspective than providers or HCFA. The PRRB has a strained relatonship with HCFA and feels that HCFA has denied it the requisite resources to do its job effectively. Members of the PRRB have publicly expressed these concerns about the PRRB's relationship with HCFA and its ability to act independently of HCFA as it believes Congress contemplated. In a 1983 letter to congressional staff, three PRRB members stated:

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[488] The American Bar Association reports that, from 1975 to 1979, the Secretary reversed 41.7% of all issues the board decided in favor of providers. American Bar Association, Report and Recommendations from the American Bar Association House of Delegates (Aug. 6, 1980). HCFA reports that between January 1976 and October 1983, the HCFA Deputy Administrator declined to review the Board's decision in about 54% of issues decided by the Board and has affirmed about 25% and reversed or modified about 21%. Preamble to Final Rule, 48 Fed. Reg. 45,766 (1983).

[489] 48 Fed. Reg. 45,774 (1983), codified in, 42 C.F.R. § 1875 (1986). See notes 285-287 supra and accompanying text.

[490] See, e.g., HCFA Dep. Admin. Dec. (Feb. 15, 1980), rev'g, PRRB Dec. No. 79-D95 (Dec. 15, 1979) (return on equity for nonprofit hospitals issue); HCFA Dep. Admin. Dec. (Oct. 17, 1980), rev'g, PRRB Dec. No. 80-D67 (Aug. 19, 1980); HCFA Dep. Admin. Dec. (Sept. 12, 1977), modifying, PRRB Dec. No 77-D50 (July 14, 1977) (labor and delivery room issue). See St. Mary of Nazareth Hospital Center v. Schweiker, 718 F.2d 459, 465 n.11 (D.C. Cir. 1983).

[491] See, e.g., PRRB Dec. No 79-D95 (Dec. 15, 1979), rev'd, HCFA Dep. Admin. Dec., (Feb. 15, 1980). The reviewing courts ruled that HHS did not have to give deference to the PRRB's decision in this case. See, Indiana Hospital Association, Inc. v. Schweiker, 544 F. Supp. 1167 (S.D. Ind. 1982), aff'd sub nom., St. Francis Hospital Center v. Heckler, 714 F.2d 872 (7th Cir. 1983), cert. denied, 465 U.S. 1022 (1984).

> Clearly, resources (personnel, equipment and material) is the most critical problem. The history of the Board supports our conclusion that the only way the Board will be able to fulfill its purpose is to be an agency independent of the Department of Health and Human Services as well as the Health Care Financing Administration (HCFA). From its inception, the Board has operated as an orphan within HCFA, with a history of unresponsiveness and inadequate support. Clearly, the Board must be independent, in fact.
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> Such independent status would also result in the elimination of the Secretary's own motion review. The delegation of this review process to HCFA has effectively impaired the providers' right to due process. This situation is exacerbated by the ex parte communication between the Deputy Administrator Attorney Advisory [the HCFA officer that handles PRRB decisions for the Deputy Administrator] and others within HCFA, such as those who promulgate policy, when reviewing individual cases after the Board has concluded the hearing and completed the evidentiary record.[492]

To enhance its independence as well as its effectiveness, some board members have suggested longer terms for Board members, i.e., twelve years rather than the present three year terms, be instituted.[493]

The second area of concern, discussed in greater detail below, is the requirement that providers appeal all payment issues to the PRRB before proceeding to federal court, including challenges to the validity of Medicare statutory or regulatory provisions which the PRRB has no authority to decide. This exhaustion requirement delays the judicial consideration of the validity of new Medicare regulations many of which have an immediate and substantial impact on providers. Congress endeavored to address this situation with the expedited review procedures in § 1878(f),[494] but providers have argued that this procedure has not significantly expedited Medicare appeals because of delays in the PRRB's determining whether or not it has jurisdiction in the case.[495]

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[492] Letter from Betty Adaniya Kraus, Paul Morton Ganeles and Richard A. Dudgeon, members of the PRRB, to Sandra Casber and Kevin Yow, staff of the House Comm. on Ways and Means (undated, 1983).

[493] Id.

[494] Social Security Act § 1878(f) 42 U.S.C. § 1395oo(f) (1982 ed., Supp. II).

The third area of concern is relatively minor, but nevertheless important, problems with PRRB procedures.[496] Many of these are shared by providers and HCFA. One problem of concern to both providers and HCFA is the timeliness of PRRB hearings and decisions. As indicated in the Table on PRRB Performance Statistics in Appendix C, the PRRB now has a backlog of about 2,750 cases; and it takes about a year after the NPR for the PRRB to make its decision.[497] The PRRB reports that the problem of delay may be abating since many cases are now being settled before hearings and thus providers who want hearings can have them virtually upon request.[498]

One problem of concern to both providers and HCFA is who represents the Medicare program's position at various steps of the appeals process. The fiscal intermediary represents the Medicare program before the PRRB. The HHS Office of General Counsel represents HCFA if the case is appealed to federal court. This division in representation for HCFA's position before the board in in federal court has sometimes resulted in an insufficient record on HCFA policies on appeal. In one important case on the labor and delivery room day issue, St. Mary of Nazareth Hospital v. Heckler,[499] the court had to remand the case to the PRRB for further development of the record on the rationale for the HCFA position.

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[495] See Alexandria Hospital v. Bowen, No. 85-676-R (W.D. Va. Mar. 17, 1986). In this case, the federal district court ruled that the 30 day period after which an expedited appeal can go directly to court if the PRRB fails to act does not commence until the PRRB decides whether or not it has jurisdiction.

[496] These include: the PRRB's use of internal manuals and guidelines not promulgated as rules under the Administrative Procedures Act in making its decisions, not sufficiently stating facts on which a decision is based, and concerns that the PRRB has exercised its rulemaking authority with respect to its procedures in 1878(g) unfairly and in a fashion intended to discourage appeals. See Peterson, Legislative Changes Urged Regarding Medicare Appeals, Health L. Vigil, May 3, 1985.

Another concern is the lack of a modern docketing system at the PRRB. The PRRB chairman maintains that the PRRB docketing and notification systems could be computerized at a cost of $200,000 which, in his judgment, would enhance the PRRB's productivity enormously.

[497] See note 477 supra.

[498] See Owens, supra note 292.

5. Hospital Waiver of Liability Appeals

In appeals of PRO decisions on waiver of liability, hospitals cannot challenge the substantive coverage issue of medical necessity but can challenge only whether the PRO was correct in its decision that the hospital knew or should have known that the service was not a covered Medicare benefit in the administrative and judicial review.[500] If the PRO erroneously determines that the care is not covered but that the hospital was without fault in providing the care, there is no forum in which the hospital can appeal and resolve the coverage issue.[501] Hospitals claim that this can be a serious problem if the hospital is not provided with clear notice as to why its care was inappropriate and is still held to that standard in the future.[502]

C. Hearing Procedures Under Part B

Since the inception of the Medicare program, beneficiaries and providers have challenged the fairness of hearing procedures for coverage and payment determinations under Part B.[503] The chief concern is the preclusion of administrative and judicial review of the carrier's decision made in the fair hearing discussed in Chapter VI, but beneficiaries have challenged several other aspects of the hearing procedures under Part B as well.

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[499] See notes 480-483 supra and accompanying text.

[500] Social Security Act § 1879(d) 42 U.S.C. § 1395pp(d) (1982 ed., Supp. II).

[501] Senate Finance Comm. Hearing on Medicare Appeals Provisions, 106-112 (statement of the Catholic Health Association of the United States) and 151 (statement of the American Hospital Association).

[502] Id.

[503] See, e.g., Armstrong v. Aetna Life Insurance Co.,[1982 Transfer Binder] Medicare & Medicaid Guide { 32,082 (D. Ore. June 25, 1982); Davis v. HEW, 416 F. Supp. 448 (S.D.N.Y. 1976); United States v. Lapin, 518 F. Supp. 735 (D. Md. 1979).

In *Gray Panthers I*[504] the United States Court of Appeals for the District of Columbia Circuit ruled that the due process clause of the Fifth Amendment, as interpreted in *Mathews v. Eldridge*,[505] required more formal hearing procedures and additional protections for beneficiaries in appeals of disputed Part B claims under $100. Although the court rejected the plaintiff's argument that procedural due process required a formal oral hearing, the court ruled that the extant procedures for appeals under Part B -- namely a paper review by the carrier-- did not comport with due process requirements because these hearings did not permit an oral interview or consultation with an official who would inform the beneficiary about the basis of the denial. With respect to what elements are required for an adequate hearing for small Part B claims, the court stated:[506]

> We believe, at a minimum, the claimant should be informed of or have access to the evidence on which the carrier relied in reaching its initial decision to deny the claim and, within a reasonable time thereafter, an opportunity to present evidence (in oral or written form) in support of his or her position. Where factual issues involving the credibility or veracity of the claimant are at stake, particular consideration of a policy granting on request an oral interview before the final denial on reconsideration should be given. At some point after the hearing, the claimant should receive a meaningful explanation of the reasons for whatever action is taken on the claim.[507]

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[504] 652 F.2d 146 (D.C. Cir. 1980), *rev'g and remanding sub nom.* Gray Panthers v. Califano, 466 F. Supp. 1317 (D.D.C. 1979), *reh'g. on remand sub nom.*, [1982 Transfer Binder] *Medicare & Medicaid Guide (CCH)* ¶ 32,144 (D.D.C. Sept. 10, 1982); Gray Panthers v. Schweiker, 716 F.2d 23 (D.C. Cir. 1983), *remanding sub nom.*, Gray Panthers v. Heckler, [1986-1 Transfer Binder] *Medicare & Medicaid Guide (CCH)* ¶ 34,981 (D.D.C. Nov. 4, 1985) (approved parties' stipulation regarding Part B claims of less than $100), [1986-1 Transfer Binder] *Medicare & Medicaid Guide (CCH)* ¶ 35,140 (D.D.C. Feb. 14, 1986) (ruled that oral hearings not required for Part A claims of less than $100).

[505] 424 U.S. 319 (1976).

[506] 652 F.2d at 167-172. [illegible] deficiencies were compounded by the lack of information about the basis of the denial contained in the EOMB. See note 382-385 *supra* and accompanying text.

[507] 652 F. 2d at 172.

After considerable litigation on the question of what due process requires for small Part B claims,[508] the Secretary agreed that carriers would be required to improve procedures for giving beneficiaries specific information about the disposition of their claim and an opportunity to talk with a knowledgeable and responsible official about the claim as well as their appeals rights through a toll-free telephone system.[509]

In the 1982 decision, Schweiker v. McClure,[510] the Supreme Court considered another challenge to Part B appeal procedures for claims of $100 or more. In this case, plaintiffs claimed that the practice of having carrier employees or appointees make final, unappealable decisions on Part B claims in fair hearings constituted a violation of beneficiaries' rights to due process of law under the fifth amendment and that beneficiaries were entitled to a hearing before an ALJ. A unanimous Supreme Court, in an opinion written by Mr. Justice Powell, concluded that carrier Part B hearing officers who were employed or appointed by the carrier were not biased absent a showing of some disqualifying interest.[511] The fact of employment or appointment by the carrier did not, without "proof of financial interest on the part of the carriers," rise to the level of a disqualifying interest.[512] The court disagreed with plaintiff's argument that beneficiaries were entitled to a hearing before an ALJ or judicial review as a matter of due process, concluding:

> Appellees simply have not shown that the procedures prescribed by Congress or the Secretary are not fair or that

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[508] Gray Panthers v. Schweiker, 652 F.2d 146 (D.C. Cir. 1980), reh'g on remand, [1982 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 32,144 (D.D.C. Sept. 10, 1982); remanding sub. nom. Gray Panthers v. Schweiker, 716 F.2d 23 (D.C. Cir. 1983), reh'g on remand sub. nom., Gray Panthers v. Heckler, [1986-Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 34,981 (D.D.C. Nov. 4, 1985) (approved parties' stipulation regarding Part B claims of less than $100), [1986-1 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 35,140 (D.D.C. Feb. 14, 1986) (ruled that oral hearings not required for Part A claims of less than $100).

[509] Gray Panthers v. Heckler, [1986-1 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶ 34,981 (D.D.C. Nov. 4, 1985).

[510] 456 U.S. 188 (1982).

[511] Id. at 196.

[512] Id. at 197.

> different or additional procedures would reduce the risk of erroneous deprivation of Part B benefits.[513]

In David v. Heckler,[514] beneficiaries alleged that many of the fair hearing procedures did not meet due process requirements, including the lack of subpoena power to give beneficiaries leverage in getting the treating physicians to supply more detailed information about the medical services provided, ex parte communications between the hearing officer and employees and the lack of adequate qualifications as well as independence of the hearing officers. The district court, however, rejected all of these arguments except to agree, as did HHS, that ex parte contacts were improper but were already proscribed by HHS regulations and did not arise frequently enough to warrant additional relief in this case.[515] Despite these court decisions, there remains continued concern about Part B hearing procedures and, as discussed below, the statutory preclusion of administrative and judicial review of coverage and payment determinations under Part B.

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[513] Id. at 200.

[514] 591 F. Supp. 1033 (E.D.N.Y. 1984).

[515] 42 C.F.R. § 405.830 (1986); Medicare Carriers Manual (HIM-14) § 12020A.

CHAPTER VI: AVAILABILITY OF ADMINISTRATIVE AND JUDICIAL REVIEW

Congress has carefully prescribed the circumstances when administrative and judicial review for Medicare coverage and payment disputes of beneficiaries and providers are available and, in several instances, has expressly precluded administrative as well as judicial review of coverage and payment disputes altogether. Congress has done so in two key areas: (1) beneficiary and provider coverage and payment disputes under Part B;[516] and (2) certain payment issues for hospitals under the prospective payment system.[517] In addition, Congress has expressly barred federal question jurisdiction for claims arising under the Social Security Act, thus shutting off judicial review for any claim except by means expressly provided for in the Social Security Act.[518] From the beginning, beneficiaries and providers have maintained that preclusions of administrative and judicial review under the Medicare program is unfair. Nevertheless, Congress has consistently retained these preclusions and the Supreme Court and other federal courts have generally upheld them.

A. Administrative and Judicial Review of Part B Coverage and Payment Disputes

The most controversial statutory preclusion of administrative and judicial review under the Medicare program has been that of coverage and payment disputes under Part B. As noted above, § 1869 only accorded administrative and judicial review to beneficiaries under Part A, and § 1842 required carriers to provide a fair hearing to beneficiaries in coverage and payment disputes.[519] Since the early years of the Medicare program, beneficiaries and providers have challenged these preclusions judicially and, for the most part, unsuccessfully.[520] Nevertheless, Congress has retained this statutory preclusion of administrative and judicial review concluding that Part B claims are small and courts would be flooded with these claims with little actual benefit to beneficiaries if administrative and judicial review were allowed.[521]

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[516] See notes 302, 319-322 supra and accompanying text.

[517] See notes 266 & 301 supra and 544-555 infra and accompanying text.

[518] Social Security Act § 205(h); 42 U.S.C. § 405(h) (1982 ed., Supp. II). See note 210-212 supra and accompanying text.

[519] See notes 209-216 supra and accompanying text.

[520] See, e.g., Herzog v. Secretary of HEW, 686 F.2d 1154 (6th Cir. 1982); Drennan v. Harris, 606 F.2d 846 (9th Cir. 1979); Pushkin v. Califano, 600 F.2d 486 (5th Cir. 1979); Prett v. Nationwide Insurance Co., 548 F.2d 1129 (4th Cir. 1977); St. Louis University v. Blue Cross Hospital Service, 537 F.2d 283 (8th Cir. 1976), cert. denied, 429 U.S. 977 (1976).

The Supreme Court has recently decided several cases raising issues of whether and when administrative and judicial review is available for appeals under Part B. On the same day as its decision in Schweiker v. McClure,[522] the Supreme Court decided United States v. Erika, Inc.[523] In this case, a major distributor of kidney dialysis supplies brought suit in the United States court of claims seeking reimbursement for Part B services after its carrier had ruled in a fair hearing under § 1842(b)(3)(C)[524] to affirm the carrier's initial calculation of the payment due the plaintiff. The court of claims had ruled that suit was within the jurisdictional grant of the Tucker Act[525] and remanded the case to the carrier for a redetermination of payment on the basis of its opinion. The sole issue before the Supreme Court in Erika was whether the court of claims had jurisdiction in this type of case.[526] The Supreme Court concluded that the court of claims did not have jurisdiction as Congress had specifically precluded judicial review of an adverse hearing officer's decision on the amount of Part B payments in § 1842(b)(3)(C). The Court did not reach the question of whether the bar to federal question jurisdiction in § 205(h) applied in this instance.[527]

The Supreme Court carefully reviewed the legislative history of § 1842(b)(3)(C) and was persuaded that Congress clearly intended to preclude administrative and judicial review of Part B claims when it enacted the Medicare appeals provisions in 1965. Congress reaffirmed this intention, according to the Court, when it amended § 1869 in the Social Security Amendments of 1972[528] to distinguish more clearly between appeals over entitlement to benefits and appeals over the amount of benefits so as, in the words of the sponsoring Senator, "to avoid overloading the courts with quite minor matters."[529]

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[521] See notes 214-216 supra and accompanying text.

[522] 456 U.S. 188 (1982). See notes 510-513 supra and accompanying text.

[523] 456 U.S. 201 (1982).

[524] Social Security Act § 1842(b)(3)(c), 42 U.S.C. § 1395u(b)(3)(C) (1982 ed., Supp. II).

[525] 28 U.S.C. § 1491 (1982 ed., Supp. II).

[526] 456 U.S. at 206.

[527] 456 U.S. at 206 n.6.

[528] Social Security Amendments of 1972 § 2990, codified as amended in, Social Security Act § 1869, 42 U.S.C. § 1395ff (1982 ed., Supp. II).

Despite these Supreme Court decisions, beneficiaries and providers have continued to press for administrative and judicial review of Part B claims chiefly because of the concern that carrier coverage and payment decisions are consistently inaccurate and result in substantial underpayment of Part B claims.[530] In the November 1985 Senate Finance Committee hearings on Medicare appeals, deficiencies in the Part B hearing procedures and, specifically, the statutory preclusion of administrative and judicial review of carrier decisions on coverage and payment dominated the discussion and were the main focus of S. 1551, the Fair Medicare Appeals Act, which was being considered at those hearings.[531] Several witnesses testified that recent developments in the Medicare program justified a reformed appeals procedure for Part B claims.[532] Specifically, the Part B program now includes highly sophisticated and expensive services provided on an outpatient basis, and thus the claims under Part B involved substantially greater sums than originally anticipated at the inception of the Medicare program. Further, witnesses expect that the size and volume of Part B claims will increase further as Medicare beneficiaries receive more of their medical care on an outpatient basis.[533]

The American Bar Association was particularly strong in its endorsement of the need for administrative and judicial review of Part B coverage and payment determinations, stating that the judicial decisions upholding the statutory preclusion of judicial review, coupled with the regulatory requirement that carrier-appointed hearing officers must comply with HHS regulations, interpretative rules and policy statements,[534] "result in Medicare beneficiaries being conclusively bound by actions of HHS, no matter how arbitrary and illegal those actions might be."[535] This position reaffirms a long standing ABA position in favor of administrative and judicial review of Part B claims.[536]

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[529] 456 U.S. at 209, quoting, 118 Cong. Rec. 33992 (1972) (statement of Sen. Bennett).

[530] See General Accounting Office, Medicare Part B Beneficiary Appeals Procedure (HRD-85-79, June 28, 1985); Senate Finance Comm. Hearings on Medicare Appeals Provisions. See notes 366-367 supra and accompanying text.

[531] See Senate Finance Comm. Hearings on Medicare Appeals Provisions.

[532] Id.

[533] Id. See notes 206-207 supra and accompanying text.

[534] 42 C.F.R. § 405.860 (1986).

HHS has consistently opposed providing administrative and judicial review of Part B claims chiefly because of the associated expense. In the 1985 Senate Finance Committee hearings on Medicare appeals provisions, HCFA reported that an estimated 16,000 Part B appeals would meet the jurisdictional requirements for ALJ review under S. 1551 at a cost of between $11 million and $17 million to the Medicare program.[537] These appeals would significantly increase the workload of the Social Security ALJ corps faced with a large volume of appeals of disability program claimants as a result of the Social Security Disability Benefits Reform Act of 1984.[538] Similarly, HHS has opposed judicial review for Part B claims on grounds that this would result in increased costs for the Medicare program as well as a firm conviction that extant hearing procedures are fair and adequate.[539]

In 1985, several congressmen introduced legislation to provide administrative and judicial review of Part B claims.[540] One of these bills, H.R. 2864, included in the House version of COBRA,[541] would have authorized administrative review of claims of $500 and above and judicial review of claims of $1,000 and above.[542] Despite strong support in both the House and Senate for reforms of Part B appeals, the provisions allowing for administrative and judicial review of Part B fair hearing decisions were dropped from COBRA just before enactment. Thus, Congress has again decided to retain the statutory preclusion of administrative and judicial review of Part B claims probably on grounds of controlling the administrative costs of the Medicare program in this time of budget constraints, but has also put the issue on the table again in this year's budget legislation.[543]

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[535] Senate Finance Comm. Hearings on Medicare Appeals Provisions at 193 (statement of the American Bar Association). See also, ABA Report and Recommendations, supra note 488.

[536] Id.

[537] Senate Finance Comm. on Medicare Appeal Provisions at 50 (statement of Henry R. Desmarais, M.D., Acting Deputy Administrator, Health Care Financing Administration). Further, the HHS Office of General Counsel reports that it costs approximately $550 to conduct an ALJ hearing.

[538] Pub. L. No. 98-469, 97 Stat. 134 (1984).

[539] Senate Finance Comm. Hearings on Medicare Appeals Provisions at 40-52 (statement of Henry R. Desmarais, Acting Deputy Administrator of the Health Care Financing Administration).

[540] H.R. 579, 99th Cong., 1st Sess. (1985); H.R. 2864, The Fair Medicare Appeals Act, 99th Cong., 1st Sess. (1985); S. 1551, The Fair Medicare Appeals Act, 99th Cong., 1st Sess. (1985).

[541] See notes 347-357 supra and accompanying text.

[542] H.R. 2864, The Fair Medicare Appeals Act, 99th Cong., 1st Sess. (1985).

B. Preclusion of Payment Issues for Hospitals Under the Prospective Payment System

In the Social Security Amendments of 1983, Congress enacted rather extraordinary preclusions of administrative and judicial review of certain elements of the payment rates under the prospective payment system.[544] In its original proposal for a prospective payment system, HHS maintained that there should be no judicial review of any payment issue under the prospective payment system out of concern that allowing hospitals to appeal elements of hospital payment rates would lead to a judicial dismantling of the rate structure of the prospective payment system. HHS stated its proposal for an expansive preclusion of judicial review and the rationale for this approach in its 1982 Report to Congress:

> Payment amounts, exceptions, adjustments, and rules to implement the prospective payment system would not be subject to any form of judicial review. Retroactive adjustment of the payment rates, as might result from judicial review, is inimical to the basic purpose of a prospective system. Moreover, the delays inherent in the judicial process, when coupled with the likelihood of annual revisions in the rates of payment, could lead to chaotic results, in which rates for a previous period may be overturned by a court, or remanded to the Department for further consideration, even though different rates had superseded the contested rates. The prospect of continuous litigation and re-opened administrative proceedings related to supposedly prospective rates for past periods can be prevented by a complete preclusion of judicial review. The omission of judicial review follows the current statutory provisions related to determinations under Medicare Part B, where judicial review is also prohibited. As with any service sold to the Government, the remedy for providers dissatisfied with the rate offered is to convince the purchasing agency that a

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[543] See note 355 supra and accompanying text.

[544] Social Security Amendments of 1983, § 602(h), codified as amended in, Social Security Act §§ 1878(g)(2) and 1886(d)(7), 42 U.S.C. §§ 1395oo(g)(2) and 1395ww(d)(7) (1982 ed., Supp. II).

> higher rate is appropriate or, failing that, to refrain from offering services to the Government.[545]

Congress shared the same concerns as HHS about the integrity of the rate structure if hospitals could appeal any issue with respect to payment rates under the prospective payment system. However, Congress drew the line more narrowly than HHS had proposed. Also, as a check on the Administration's authority to recalibrate DRG's and set hospital payment rates, Congress created ProPAC to monitor and evaluate HHS's performance in setting payment rates and mandated that ProPAC analyze the hospital payment rates and DRG's independently of HHS and advise HHS of its findings.[546]

Specifically, the Social Security Amendments of 1983 preclude administrative and judicial review of the establishment of DRG's, the methodology for classifying patient discharges into DRG's and the appropriate weighting factors for DRG's.[547] The House Ways and Means Committee stated the rationale for preclusion of administrative and judicial review of these issues:

> Since the prospective payment system will no longer have any relationship to a hospital's actual costs, a hospital should not be permitted to argue that the level of payment is inadequate to cover its cost.[548]

The House Ways and Means Committee also stated, in a comment reflecting congressional concern about the integrity of the rate structure, that the statutory preclusion was necessary "because of the complexity of such action and the necessity of maintaining a workable payment system."[549]

Congress has also expressly excluded from administrative or judicial review the factor used in a hospital's current payment formula to ensure compliance with the so-called "budget neutrality" requirement that the prospective payment system result in aggregate Medicare payments equal to "what would have been payable" under the previous reimbursement methodology for FY 1984 and FY 1985.[550] This budget neutrality adjustment is a factor created to ensure that the amount of outlier costs would not result in overall Medicare hospital expenditures in excess of the estimates of budgetary outlays for FY 1984 and FY 1985 in the Tax Equity and Fiscal Responsibility Act of 1982.[551] While this "budget neutrality" requirement expired on September 30, 1985, the close of FY 1985, its legality has yet to be judicially tested due to the time lag between the hospitals' closing of these fiscal years for accounting purposes and Medicare's notice of program reimbursement for that year -- an event which, according to HCFAR-84-1, must transpire before an appeal can be made.[552]

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[545] HHS Report to Congress at 41.

[546] See note 266 supra.

[547] Social Security Amendments of 1983 § 602(h)(3) codified as amended in, Social Security Act § 1878(g), 42 U.S.C. §§ 1395oo(g) (1982 ed., Supp. II); 42 C.F.R. § 405.1804 (1986).

[548] H. Rep. No. 25, Pt. I, 98th Cong., 2d Sess. 143 (1983).

[549] Id. at Pt. I, 143.

As yet, no case has challenged the statutory preclusion of administrative and judicial review of the DRG prices or the budget neutrality factor, despite the fact that the hospital industry has alleged repeatedly that HHS has been unfair in updating the DRG prices and has ignored ProPAC's recommendations.[553] One very plausible reason for the dearth of hospital challenges to this preclusion is that hospitals, for the most part, are doing quite well under the prospective payment system and are showing record profits.[554] Another probable reason is the difficulty a hospital would have in bringing a successful challenge to the methodology for establishing DRG weights and classification criteria absent egregious and obvious arbitrariness on the part of HHS in setting the DRG prices.

Perhaps more important for hospitals is HCFA's delegation of certain issues for adjudication to PROs, i.e., disputes over "outliers" and errors in DRG coding for particular cases and the lack of administrative or judicial review of these determinations.[555] The decision of a PRO with respect to a DRG classification can have important financial implications for hospitals, and yet a hospital has no recourse other than PRO reconsideration for an adverse determination.

Hospitals have complained about this lack of review, but as yet no suits have been filed challenging this arrangement.[556] In an earlier challenge to the PSRO program, Association of American Physicians and Surgeons v. Weinberger,[557] plaintiff physicians, relying on Tumey v. Ohio,[558] argued that the statutory delegation of adjudicative authority over physicians to private organizations, that were inherently biased against physicians because of their contractual relationship with HHS and their economic self-interest, was unconstitutional. The court rejected the arguments that PSRO's were biased and that there had been an unconstitutional delegation of judicial power, stating:

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[550] Social Security Amendments of 1983 § 601(e), codified as amended in, Social Security Act § 1886(e)(1)(A), 42 U.S.C. § 1395ww(e)(1)(A) (1982 ed., Supp. II); 42 C.F.R. § 405.1804 (1986).

[551] Social Security Amendments of 1983, § 601(e), codified as amended in, Social Security Act § 1886(d)(1)(F), 42 U.S.C. § 1395ww(d)(1)(F) (1982 ed., Supp. II).

[552] See note 468 supra and accompanying text.

[553] See notes 399-401 supra and accompanying text.

[554] See notes 198-199 supra and accompanying text.

[555] See notes 297-301 supra and accompanying text.

> [I]t has been held permissible for agencies of the federal government to contract with private organizations in order to have such organizations perform governmental functions as long as the particular administrative scheme provides for a hearing on the determinations made by those private organizations. See State of Texas v. National Bank of Commerce of San Antonio, 290 F.2d 229 (5th Cir.), cert. denied, 368 U.S. 832 [Parallel cites omitted] (1961), and Coral Gables Convalescent Home, Inc. v. Richardson, 340 F. Supp. 646 (S.D. Fla. 1972).[559]

In light of the extraordinary nature of this administrative arrangement and, particularly, the extensive adjudicative responsibilities of PROs with respect to certain hospital payment issues, and the preclusion of administrative and judicial review to serve as a check to private action, it is appropriate to raise the question of whether the various delegations of adjudicative power to PROs is appropriate or even constitutional.

C. Jurisdictional Bar to Judicial Review Under the Social Security Act

A persistent complaint of both beneficiaries and providers is the strict requirement that claimants exhaust all administrative remedies in challenges to the validity of a regulation, program directive or HHS policy because of the bar to federal question jurisdiction in § 205(h) for any issue associated with a claim. Beneficiaries and providers alike have argued that this jurisdictional bar as interpreted in Weinberger v. Salfi,[560] which ruled that this bar applies even with respect to an associated con-stitutional claim, imposes unreasonable administrative exhaustion requirements on challenges to the validity of statutory and regulatory provisions that administrative tribunals have no authority to adjudicate.[561]

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[556] See Senate Finance Comm. Hearings on Medicare Appeals Provisions at 112-115 (statement of the Catholic Health Association of America).

[557] 395 F. Supp. 125 (N.D. Ill. 1975) aff'd. sub nom. without opinion, Association of American Physicians and Surgeons v. Mathews, 423 U.S. 975 (1975).

[558] 273 U.S. 510 (1927).

[559] 395 F. Supp. at 140.

[560] 422 U.S. 749 (1975).

Both beneficiaries and providers have sought to obtain judicial review of coverage and payment determinations under the Medicare program through means other than the statutory grants of judicial review in the Social Security Act and, specifically, to circumvent the bar to federal question jurisdiction in § 205(h). Claimants have used two approaches to establish federal jurisdiction for judicial review. These include an implied grant of jurisdiction under § 10 of the Administrative Procedure Act[562] and bringing suit in the United States Court of Claims under the jurisdictional grant of the Tucker Act.[563] The Supreme Court has handily rejected both of these. In its 1977 decision, Califano v. Sanders,[564] the Supreme Court ruled that the APA provided no independent grant of federal jurisdiction.[565] In United States v. Erika, Inc.,[566] the Supreme Court rejected the court of claims' position that it had independent jurisdiction over Medicare claims under the Tucker Act.[567]

Claimants have also sought to mitigate the harsh consequences of the jurisdictional bar in § 205(h) by invoking the All Writs Act in 28 U.S.C. § 1651[568] and establishing limited federal jurisdiction in Medicare cases.[569] In

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[561] See Goldstein, The Procedural Impact of Weinberger v. Salfi Revisited, 31 DePaul L. Rev. 721 (1982); Comment, Federal Question Jurisdiction over Medicare Provider Appeals After Weinberger v. Salfi: Toward a Principled Construction of the Statutory Bar, 65 Va. L. Rev. 1383 (1979).

[562] 5 U.S.C. §§ 701-706 (1982 ed., Supp. II).

[563] 28 U.S.C. § 1491 (1982 ed., Supp. II).

[564] 430 U.S. 99 (1977).

[565] See Schwartz, Califano v. Sanders and the Administrative Procedures Act Interpretation: Has the Supreme Court's "Hospitable" Attitude Given Way to a More Restrictive Approach, 55 Tex. L. Rev. 1323 (1977).

[566] See notes 523-529 supra and accompanying text.

[567] See Whitecliff, Inc. v. U.S., 536 F.2d 347 (2d Cir. 1976), cert. denied, 430 U.S. 969 (1977), relying on, 28 U.S.C. § 1491 (1982 ed., Supp. II).

[568] 42 U.S.C. § 1651 (1982 ed., Supp. II). The all Writs Act provides in pertinant part:

> The Supreme Court and all Courts established by Act of

V.N.A. of Greater Tift County, Inc. v. Heckler,[570] the Eleventh Circuit, relying on *Federal Trade Commission v. Deans Foods Co.*,[571] recognized federal jurisdiction under the All Writs Act despite the jurisdictional bar in § 205(h) in order to stay the agency's enforcement of its decision and preserve the status quo pending the court's review through prescribed statutory channels. In addition, claimants have sought to use mandamus as a means of compelling agency action in Medicare cases, irrespective of the jurisdictional bar in § 205(h), with limited success.[572]

In *Heckler v. Ringer*[573] the Supreme Court considered the application of the jurisdictional bar in § 205(h) in a suit brought by four beneficiaries challenging HCFA's policy that carodid body resection as a means of relieving pulmonary distress was not a covered benefit under the Medicare program which

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> Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law. *Id.* at § 1651(a).

[569] *See, e.g.*, Redbud Community Hospital District v. Heckler, [1984-2 Transfer Binder] *Medicare & Medicaid Guide (CCH)*. ¶ 34,085 (N.D. Cal. July 30, 1984); Alabama Home Health Care, Inc. v. Schweiker, 527 F. Supp. 849 (N.D. Ala. 1981), *dismissed and vacated sub nom.*, Alabama Health Care, Inc. v. Hedder, 711 F.2d 988 (11th Cir. 1983). *But see* Florida Medical Association v. Department of Health, Education and Welfare, 601 F.2d 199 (5th Cir. 1979) *vacating injunction issued in*, 454 F. Supp. 326 (M.D. Fla. 1978).

[570] 711 F. 2d. 1020 (11th Cir. 1983), *cert. denied*, 466 U.S. 936 (1984).

[571] 384 U.S. 597 (1966).

[572] *See, e.g.*, Dietsch v. Schweiker, 700 F.2d 865 (2d Cir. 1983) (allowing mandamus); Samaritan Health Center v. Heckler, *Medicare & Medicaid Guide (CCH)* ¶ 34,862 (D.D.C. Aug. 29, 1985); McCuin v. Heckler, *Medicare & Medicaid Guide (CCH)* ¶ 34,528 (D.N.H. Feb. 27, 1985); Jameson v. Heckler, *Medicare & Medicaid Guide (CCH)* ¶ 34,534 (E.D. Ca. Feb. 15, 1985); David v. Heckler 591 F.2d 1033 (S.D. N.Y. 1984). *But see* Good Samaritan Medical Center v. Secretary of HHS, 776 F.2d 594 (6th Cir. 1985); Hatcher v. Heckler, 772 F.2d 427 (8th Cir. 1985); American Federation of Home Health Agencies, Inc. v. Heckler, 754 F.2d 896 (11th Cir. 1985); Starnes v. Schweiker, 748 F.2d 217 (4th Cir. 1984), *cert. denied* ___ U.S. ___, 105 S.Ct. 2022 (1985) (denying mandamus). In *Heckler v. Ringer*, the Supreme Court declined to decide the effect of § 205(h) on the availability of mandamus jurisdiction in Social Security cases. 466 U.S. at 616.

[573] 466 U.S. 602 (1984).

HCFA promulgated in HCFAR 80-1[574] after ALJ's had consistently ruled in favor of claimants in coverage disputes over this procedure. Plaintiffs alleged that since they were challenging HCFA's coverage policy rather than just a determination on a claim, they were entitled to proceed directly to federal court without having an administrative hearing. The Supreme Court rejected this argument and, reaffirming its position in Weinberger v. Salfi,[575] ruled that the bar to federal question jurisdiction in § 205(h) included beneficiaries' disputes over coverage and, thus, beneficiaries had to exhaust their administrative remedies under § 205(b) before proceeding to federal court.

However, the Supreme Court's most recent decision, Bowen v. Michigan Academy of Family Physicians,[576] wrought a significant erosion of the jurisdictional bar of § 205(h). In this case, an association of family physicians and several individual physicians challenged Medicare regulations permitting different levels of payment to general practitioners and specialists for the same services. A unanimous Court in a decision written by Mr. Justice Stevens[577] recognized a right of judicial review for challenges to the regulations setting the methodology used to set payment rates under Part B despite the statutory preclusion of judicial review of Part B claims in § 1869[578] and the jurisdictional bar in § 205(h).

Reviewing its earlier decisions enunciating the strong presumption in favor of judicial review of administrative action,[579] the court concluded that § 1842(b)(3)(C)[580] which the Court had earlier construed as a valid statutory preclusion of judicial review of the amount of Part B benefits in United States

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[574] HCFAR-80-1, Exclusion of Bilateral Carodid Body Resection to Relieve Pulmonary Distress, 45 Fed. Reg. 71,431 (1980).

[575] 422 U.S. 749 (1975). See notes 222-223 supra and accompanying text.

[576] 54 U.S.L.W. 4594 (U.S. June 9, 1986) (No. 85-225).

[577] Mr. Justice Rehnquist, who wrote the majority opinion in Heckler v. Ringer, did not participate in this decision.

[578] Social Security Act § 1869, 42 U.S.C. § 1395ii (1982 ed., Supp. II).

[579] See, e.g., Stark v. Wickard, 321 U.S. 288 (1944); Abbott Laboratories v. Gardner, 387 U.S. 136 (1967); Barlow v. Collins, 397 U.S. 159 (1970), Dunlop v. Bachowski, 421 U.S. 560 (1975).

[580] Social Security Act § 1842(b)(3)(C); 42 U.S.C. § 1395u(b)(3)(C) and § 1869, Social Security Act § 1869, 42 U.S.C. § 1395ff (1982 ed., Supp. II).

v. Erika, Inc.,[581] "simply does not speak to challenges mounted against the method by which such amounts are to be determined rather than the determinations themselves [Emphasis the Court's]."[582] The court then concluded:

> We conclude, therefore, that those matters which Congress did not leave to be determined in a "fair hearing" conducted by the carrier -- including challenges to the validity of the Secretary's instructions and regulations -- are not impliedly insulated from judicial review by 42 U.S.C. § 1385ff [Emphasis the Court's].[583]

Clarifying its position in its earlier decisions of Salfi, Ringer, and Erika, the Supreme Court emphasized that the statutory preclusions of federal jurisdiction and judicial review in these cases pertained to disputes over the amount of benefits, stating that:

> matters which Congress did not delegate to private carriers, such as challenges to the validity of the Secretary's instructions and regulations are cognizable in courts of law. [Emphasis the Court's][584]

This is an extraordinarily important decision for the entire Medicare appeals system. It addresses one of the most widespread and strongest concerns among beneficiaries and providers under both Part A and Part B -- the inability to challenge HHS regulations, rulings and program directives governing a coverage or payment claim except where expressly permitted under the Social Security Act because of the jurisdictional bar in § 205(h). The implications of this case for the Medicare appeals system have yet to unfold although it is fair to say that this decision will open the gates for future court challenges to HHS regulations, policies and directives governing all aspects of the Medicare program and possibly without the necessity of exhausting administrative remedies for the adjudication of coverage and payment disputes under the Social Security Act.

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[581] 456 U.S. 201 (1982).

[582] 54 U.S.L.W. at 4597.

[583] Id. 4597.

[584] Id. at 4598.

CHAPTER VII: PROPOSED RECOMMENDATIONS AND SUGGESTIONS FOR FURTHER STUDY

Below are outlined some proposed recommendations for improvements in the Medicare appeals system. In addition, this chapter also indicates where more information and further study is necessary before definitive recommendations for changes are appropriate. In making these proposed recommendations and suggestions for further study, it is important never to forget the financial constraints on HHS and HCFA in administering the Medicare program. Thus, in proposing changes in the Medicare appeals system, it is necessary to assess the cost of the proposed change against the benefit to be derived. While some changes in the Medicare appeals system would clearly make for a more fair appeals system, they may be unduly costly, may benefit only a few individuals or may benefit many in a minimal way and thus not be justifiable.

A. Program Administration Issues

This study identified three problem areas in the administration of the Medicare program: (1) intermediary and carrier coverage and payment determinations, (2) setting the price under the prospective payment system, and (3) implementation of the PRO program. With respect to these areas, recommendations for changes are appropriate and further study clearly indicated.

1. Intermediary and Carrier Coverage and Payment Determinations

The performance of fiscal intermediaries and carriers in making coverage and payment determinations has been controversial. Specifically, carriers and fiscal intermediaries, often at HCFA's direction, have engaged in disturbing practices in making coverage and payment determinations under the Medicare program -- a matter of some concern since these practices often result in unwarranted financial liability for beneficiaries. These practices include use of unpublished guidelines and standards in making coverage determinations, systematically interpreting statutory language defining benefits to effectively reduce benefits under the Medicare program, and communicating with beneficiaries about coverage and payment determinations and appeal rights in an incomprehensible fashion that inhibits beneficiaries from seeking corrections of errors in these determinations or exercising their appeal rights in a meaningful fashion.

The problems raised in this study were reported in congressional hearings or challenged in litigation. Their existence suggests that problems with other procedures used to make coverage and payment determinations may exist and may also compromise the interests of Medicare beneficiaries. The performance of fiscal intermediaries and carriers in making coverage and payment determinations and the specter of problems in this area pose critical issues for the Medicare program, given the extraordinary role of these private organizations in the administration of this program. One key element of this issue is the appropriateness of delegating these major program functions to private organizations and the adequacy of current procedures to protect beneficiaries' entitlement interest in Medicare benefits under this administrative arrangement.

Clearly more information is needed about how fiscal intermediaries and carriers make coverage and payment determinations and handle beneficiary complaints regarding these determinations. Several identified problems with making coverage and payment determinations need particular study as well. These include: the process for determining the reasonable charge for physicians' services under Part B, HCFA's technical denials policy with respect to home health benefits and its implementation by fiscal intermediaries,[585] and whether the problems in the communications of fiscal intermediaries and carriers with beneficiaries about coverage and payment decisions have been adequately addressed as a result of reforms mandated in the Gray Panthers litigation.[586] In view of these problems and their importance to the overall integrity of the Medicare program, a comprehensive, empirical study to obtain information about the procedures of fiscal intermediaries and carriers in making coverage and payment determinations should be conducted.

Another issue deserving additional analysis is the use of statistical sampling to project overpayments to providers pursuant to HCFAR-86-1.[587] This approach to calculating overpayments to providers may well be justified although it probably should be done pursuant to explicit statutory authority which carefully delineates the circumstances in which it may be used. Further, there is question as to why current Medicare fraud and abuse authorities such as the Civil Monetary Penalties Act[588] are not sufficient to address the type of systematic overbilling that HCFAR-86-1 attempts to correct.

Suggestions for Further Study:

- A comprehensive, empirical study should be conducted of the role, performance and procedures of fiscal intermediaries and carriers in making coverage and payment determinations under Part A and Part B.

- A study of procedures for making coverage and payment determinations for home health benefits should be conducted with specific examination of HCFA's use of statistical sampling to project overpayments to providers pursuant to HCFAR-86-1 and also HCFA's technical denials policy.

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[585] See notes 368-369 supra and accompanying text.

[586] See notes 382-392 supra and accompanying text.

[587] See notes 373-375 supra and accompanying text.

[588] Civil Monetary Penalties Act of the Omnibus Budget Reconciliation Act of 1981 § 2105, codified as amended in, Social Security Act § 1128A, 42 U.S.C. § 1320a-7a (1982 ed., Supp. II); 45 C.F.R. §§ 100.100-.129 (1986).

Recommendations

- HCFA should publish and make available upon request to beneficiaries and providers all standards and guidelines used in making coverage and payment determinations under Part A and Part B.

- HHS, by regulation, or Congress, by legislation if necessary, should prohibit fiscal intermediaries and carriers from using practices of the insurance industry, i.e., "rules of thumb" or screens that are not published in regulations or program instructions, in making coverage and payment determinations under Part A and Part B.

- HCFA should ensure that program instructions containing important interpretations of Medicare benefits are promulgated according to informal rulemaking procedures. This approach would ensure that the medical profession, beneficiaries and other interested parties have an opportunity to comment on the medical and other significant implications of HCFA's interpretation of benefits.

2. Setting the Price under the Prospective Payment System

Congress, ProPAC and hospitals have expressed concern that HHS is primarily motivated by reducing the Medicare budget in setting and updating hospital payment rates under the prospective payment system. A key question is whether the current administrative arrangement adequately protects hospitals from arbitrary HHS action in setting hospital payment rates. Under the current administrative arrangement, hospitals are expressly precluded from challenging DRG's or their derivation through administrative or judicial review. This begs the question of whether the informal rulemaking process which HHS must follow in updating hospital payment rates and ProPAC's role in independently analyzing and commenting on HHS's performance in updating payment rates under congressional auspices is sufficient to protect individual hospitals' interests in fair and adequate payment rates and mitigate the need for administrative and judicial review?

This issue requires additional analysis before definitive recommendations are appropriate. On the one hand, hospitals are doing well financially under the prospective payment system -- a fact that must be considered in assessing hospitals' concerns about deficiencies in appeals procedures for hospital payment. On the other hand, ProPAC and Congress have criticized HHS' method of updating hospital payment rates under the prospective payment system. The resolution of this issue may require more experience with the prospective payment system to determine if the administrative arrangement works in the manner

Congress originally contemplated and protects the legitimate interests of hospitals in fair Medicare payment rates.

Suggestion for Further Study:

- o An analysis should be conducted of whether the current administrative arrangement for updating hospital payment rates under the prospective payment system is adequate to protect individual hospitals' interest in fair payment rates while giving HHS sufficient flexibility to achieve necessary budget savings.

3. Implementation of the Peer Review Program

In American Hospital Association v. Bowen,[589] hospitals successfully challenged HCFA's implementation of the PRO program through program instructions and contract provisions that had not been promulgated as rules under the Administrative Procedure Act. The PRO program is a major program with the critical function of monitoring hospital conduct toward individual beneficiaries and the quality of hospital care under the prospective payment system. Consequently, the confusion generated by this decision should be resolved as soon as possible.

Recommendation:

- o HHS should promulgate an interim final rule to implement the PRO program in the manner indicated in American Hospital Association v. Bowen. This rule should address matters now covered in program instructions and PRO contract provisions.

B. Administrative Hearing Issues

This study identified a number of problem areas regarding administrative hearing procedures for coverage and payment determinations under Part A and Part B of the Medicare program. These include: (1) beneficiary coverage appeals under Part A, (2) provider disputes under Part A, and (3) hearing procedures for beneficiaries and providers under Part B.

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[589] See notes 417-419 supra and accompanying text.

1. Beneficiary Appeals under Part A

There are three areas of particular concern regarding beneficiary coverage appeals under Part A:[590] appeals under the prospective payment system, provider representation of beneficiaries in Part A appeals, and deficiencies in appeal procedures for claims under $100.[591] With respect to beneficiary appeal procedures under the prospective payment system, the most serious problem has been adequately informing beneficiaries of their appeal rights particularly with respect to hospital and/or PRO decisions that continued stay of a beneficiary in the hospital is no longer necessary. HCFA, Congress and ProPAC are aware of this problem and have adopted or are now considering measures to address it.[592] Recommendations should thus be deferred and further monitoring undertaken to ascertain if these measures have resolved this problem.

The role and responsibilities of PROs in adjudicating appeals over coverage and payment determinations under the prospective payment system for both beneficiaries and hospitals have generated concern. There is question whether PROs fully appreciate and understand their adjudicative responsibilities for beneficiary coverage determinations and certain payment issues for hospitals under the prospective payment system.[593] An empirical study should be conducted to obtain more information about PRO performance in discharging these responsibilities. Specifically, such a study should ascertain whether PROs fully understand their adjudicative responsibilities and whether they have adopted standards and guidelines to conduct the adjudications assigned to them.

Suggestions for Further Study:

- A comprehensive, empirical study should be conducted of the performance by PROs of their adjudicative responsibilities with respect to appeals of beneficiaries and hospitals under the prospective payment system.

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[590] With regard to administrative hearings before ALJ's and the SSA Appeals Council, no recommendations or suggestions for further study are made since the concerns of Medicare beneficiaries are similar to those of other Social Security programs and the American Bar Association with the involvement of the Administrative Conference of the United States has addressed these hearing procedures and made recommendations in another context. See notes 425-426 supra and accompanying text.

[591] As for hearing procedures for claims under $100, the United States District Court for the District of Columbia in the Gray Panthers litigation ruled that expanded hearing procedures for these claims is not required since there are less than 100 such claims annually. This conclusion is eminently reasonable given the current financial constraints of the Medicare program. See notes 453-457 supra and accompanying text.

[592] See notes 427-436 supra and accompanying text.

[593] See notes 437-441 supra and accompanying text.

The question of whether providers should be able to represent beneficiaries in appeals over coverage determinations raises the larger questions of what is the interest of providers in coverage determinations and the extent of the rights of beneficiaries to select their own representatives in disputes over coverage determinations. HCFA's policy of not permitting providers to represent beneficiaries is predicated on HCFA's perception that providers often coerce beneficiaries to bring appeals they would not otherwise bring.[594] Yet, as a practical matter, providers under Part A are usually financially liable for the care provided if there is an adverse coverage determination and thus have some interest in the coverage issue. But more importantly, HHS regulations permit beneficiaries to select their own representatives in coverage appeals[595] and HCFA's rationale for its policy on provider representation of beneficiaries simply does not justify carving out an exception to this regulatory policy.

Recommendation

o HCFA should withdraw its program instructions prohibiting providers from representing beneficiaries in coverage disputes under Part A as this prohibition undermines HHS' regulations authorizing beneficiaries to select attorneys or other persons not otherwise disqualified to represent them in appeals of disputes arising under the Medicare program.

2. Provider Payment Disputes Under Part A

There are five problem areas with respect to provider disputes under Part A: jurisdiction of the PRRB for hospital appeals under the prospective payment system; retrospective correction of errors in payment rates; HHS non-acquiescence with judicial decisions; the PRRB's role and procedures; and hospital waiver of liability appeals.[596] Since the inception of the Medicare program, HHS has taken a very tough stand in provider challenges to payment levels under Part A. As guardian of the Medicare trust funds and given current budget pressures, this position is clearly appropriate.

At some point, however, a question of fairness is raised. This point may have been reached with respect to some Medicare payment issues in view of the fact that federal district and appellate courts have almost uniformly rejected these policies. HHS might reevaluate these payment policies in light of these judicial decisions. But HHS has not adopted this approach and has often refused to follow adverse court decisions on Medicare payment policies.[597] Such nonacquiescence in judicial decisions is also troubling. In light of recent judicial decisions, some recommendations are appropriate and further study warranted.

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[594] See note 444 supra and accompanying text.

[595] 20 C.F.R. § 404.1705(b) (1986).

[596] The question of hospital appeals on waiver of liability issues raises the more central question of what rights a provider ought to have to contest an adverse coverage determination.

Recommendations:

o HCFA should repeal HCFAR-84-1[598] and interpret the language in 1878(a), "final determination of the Secretary as to the amount of payment"[599] to mean the fiscal intermediary's final determination of the prospective payment rate for the upcoming fiscal year as construed in Washington Hospital Center v. Bowen.[600]

o HCFA should revise its regulations[601] to allow retroactive correction of errors in the calculation of a hospital's base year for purposes of calculating hospital payment rates under the prospective payment system during the transition period.[602]

o HHS should develop a principled policy on when it will acquiesce to judicial decisions affecting the Medicare program and all other programs under the Social Security Act.

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[597] See notes 479-486 supra and accompanying text.

[598] See note 468 supra and accompanying text.

[599] Social Security Act § 1878(a), 42 U.S.C. § 139500(a) (1982 ed., Supp. II).

[600] See notes 470-472 supra and accompanying text.

[601] 42 C.F.R. § 412.72 (1986).

[602] See notes 473-478 supra and accompanying text.

Suggestions for Further Study:

- An analysis should be conducted of the future role of the PRRB as well as whether the PRRB should be an independent tribunal and what specific responsibilities it should assume.

3. Hearing Procedures Under Part B

The specific character of the procedures for Part B hearings for all coverage and payment determinations has been addressed in the Gray Panthers and other recent litigation, and HCFA has adopted changes to implement some of the concerns about Part B hearing procedures raised in those cases.[603] Nevertheless, dissatisfaction among beneficiaries and providers with these hearing procedures and continued changes in the amount and nature of benefits provided under Part B as well as substantial evidence that there are often errors and underpayments with respect to Part B benefits that have grave financial implications for beneficiaries are sufficient evidence to suggest that elimination of this statutory preclusion is appropriate.

Recommendation:

- Congress should authorize administrative review of major Part B coverage and payment determinations.

C. Availability of Administrative and Judicial Review

Of all legal issues regarding the Medicare appeals system, the statutory preclusion of administrative and judicial review of certain coverage and payment determinations under the Medicare program has given rise to the greatest concern of beneficiaries and providers. Congress has explicitly precluded administrative and judicial review for coverage and payment determinations under Part B and for certain payment issues under Part A's prospective payment system for hospitals. Also of concern to beneficiaries and providers has been the operation of § 205(h) of the Social Security Act[604] to preclude federal question jurisdiction for cases involving claims for payment except when the Social Security Act explicitly authorizes judicial review.

1. Preclusion of Administrative and Judicial Review of Part B Claims

With respect to the appropriateness of changing the current statutory preclusion of administrative and judicial review of coverage and payment determinations under Part B, it is important to appreciate that the Supreme Court has resoundly upheld this statutory preclusion and Congress has declined to change this arrangement after actively considering such changes just last year.

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[603] See notes 500-515 supra and accompanying text.

[604] Social Security Act § 205(h), 42 U.S.C. § 402(h) (1982 ed., Supp. II).

Nevertheless, for reasons stated above,[605] Congress should authorize judicial as well as administrative review of major Part B coverage and payment disputes.

Recommendation:

- Congress should authorize judicial review of major Part B coverage and payment determinations.

2. Preclusion of Administrative and Judicial Review of Certain Hospital Payment Issues

The preclusion of administrative and judicial review with respect to certain payment issues, i.e., matters related to determining the DRG's or the budget neutrality factor, under the prospective payment system is unusual. However, these statutory preclusions may well be desirable because of the clear need to preserve the integrity of the prospective payment system's rate structure. The central question, identified above, is whether Congress has designed the rate setting process in such a way that will ensure that hospitals are fairly compensated for the services they provide to Medicare beneficiaries. As suggested above, this is a question warranting further examination.

3. Jurisdictional Bar to Judicial Review Under the Social Security Act

One of the most intractable problems for beneficiaries and providers under the Medicare program has been the bar to federal question jurisdiction in § 205(h) of the Social Security Act and its application, in light of Weinberger v. Salfi and Heckler v. Ringer, to prevent beneficiaries and providers from challenging statutory and regulatory provisions as well as HHS policies related to coverage and payment determinations without first exhausting all administrative remedies.[606] However, this concern may well be mitigated by the Supreme Court's recent decision in Bowen v. Michigan Academy of Family Practice which allowed federal question jurisdiction without exhaustion of administrative remedies where plaintiffs challenged a policy on the methodology for setting a payment rate rather than the amount of payment in a claim.[607] This case may well change the entire complexion of the jurisdictional issues under the Social Security Act. Consequently, recommendations and even further study should be deferred until courts have interpreted this decision in other contexts and reconciled it with the Supreme Court's earlier decision in Heckler v. Ringer.

D. Proposal for a Conference on the Medicare Appeals System

Because of the complexity of the Medicare program, the prospect of additional and ongoing changes in the program, and the volume of concerns and complaints about all aspects of the Medicare appeals system from beneficiaries and providers, it is recommended that the Administrative Conference of the United

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[605] See note 604 supra and accompanying text.

[606] See notes 560-575 supra and accompanying text.

[607] See notes 576-584 supra and accompanying text.

States sponsor a conference on the Medicare appeals system to obtain more information about and analysis of problems with the Medicare appeals system as well as ideas for future recommendations for reforms. This conference should convene experts from HHS, HCFA, ProPAC, congressional staff and beneficiary and provider groups as well as leading practitioners and scholars to analyze the problems with the Medicare appeals system and make more recommendations for specific reforms or consider even a major restructuring of the Medicare appeals system. Issues that should be addressed at the conference include:

1. Program Administration Issues

   - What is the appropriate role of fiscal intermediaries, carriers and PROs in making coverage and payment determinations and in performing other administrative functions under the Medicare program?

   - Are the procedures used by fiscal intermediaries, carriers and PROs in making coverage and payment decisions in individual cases fair and adequate?

   - Is the current administrative arrangement for updating hospital payment rates under the prospective payment system adequate to protect individual hospitals' interests in fair payment rates while giving HHS sufficient flexibility to achieve necessary budget savings?

   - Is the process that HCFA uses to make decisions under Part A and Part B as to whether new procedures and technologies are covered Medicare benefits fair to beneficiaries, providers and other affected groups?

2. Administrative Hearing Issues

   - Are the procedures for adjudicating coverage and payment disputes under Part B adequate to protect the interests of beneficiaries and providers in view of continuing changes in the nature and amount of benefits under Part B?

   - What is the legitimate interest of providers in coverage determinations and what rights of appeal should be available for providers to protect that interest?

- Should there be a Medicare appeals division in HCFA with ALJ's to adjudicate coverage and payment disputes of beneficiaries under Part A and possibly Part B, and, if so, how should such a division be structured?

- What should be the future role of the PRRB? Should it be an independent tribunal, and what specific adjudicative responsibilities should it assume?

3. Availability of Administrative and Judicial Review

- Is it still appropriate to preclude administrative and judicial review of coverage and payment determinations under Part B and, if not, how should administrative and judicial review of such claims be structured?

- Does the current administrative arrangement for updating hospital payment rates under the prospective payment system provide enough protection to the interest of individual hospitals in a fair payment rate to justify the preclusion of administrative and judicial review of major payment issues?

E. Conclusion

The Medicare appeals system is complex and one that has been called upon to deal with the challenges posed by great changes in the Medicare program and the American health care system in recent years. But, despite these changes, there has not been a comprehensive study of how the Medicare appeals system should be structured to meet these challenges and ensure that beneficiaries served by the Medicare program and providers that furnish covered benefits are treated fairly. In view of the restructuring of the hospital payment system in 1983 and the contemplated changes in Part B of the Medicare program, it is now especially appropriate to reexamine whether the appeals system designed and implemented in the late 1960's and early 1970's can meet the challenges posed by a significantly different health care system and Medicare program. This study is a first step in such an endeavor.

APPENDIX A

List of Diagnosis-Related Groupings (DRGs)

DRG DATA AS OF 10/1/85

DRG	DESCRIPTION	GEO MEAN DAY	TRIM DAY	WEIGHT
001	CRANIOTOMY AGE >=18 EXCEPT FOR TRAUMA	16.2	33	3.56320
002	CRANIOTOMY FOR TRAUMA AGE >=18	13.4	30	3.81170
003	CRANIOTOMY AGE <18	12.7	30	2.91830
004	SPINAL PROCEDURES	15.0	32	2.73000
005	EXTRACRANIAL VASCULAR PROCEDURES	8.0	25	1.65100
006	CARPAL TUNNEL RELEASE	2.3	7	.40720
007	PERIPH & CRANIAL NERVE & OTHER NERV SYST PROC AGE >=70 &/OR C.C.	6.1	23	1.38670
008	PERIPH & CRANIAL NERVE & OTHER NERV SYST PROC AGE <70 W/O C.C.	3.7	19	.74660
009	SPINAL DISORDERS & INJURIES	8.4	25	1.42370
010	NERVOUS SYSTEM NEOPLASMS AGE >=70 AND/OR C.C.	7.8	25	1.13240
011	NERVOUS SYSTEM NEOPLASMS AGE <70 W/O C.C.	6.1	23	.93380
012	DEGENERATIVE NERVOUS SYSTEM DISORDERS	7.8	25	1.00160
013	MULTIPLE SCLEROSIS & CEREBELLAR ATAXIA	7.7	25	.97690
014	SPECIFIC CEREBROVASCULAR DISORDERS EXCEPT TIA	6.5	26	1.31440
015	TRANSIENT ISCHEMIC ATTACK & CEREBRAL OCCLUSIONS	4.7	19	.62410
016	NONSPECIFIC CEREBROVASCULAR DISORDERS WITH C.C.	6.8	24	.90440
017	NONSPECIFIC CEREBROVASCULAR DISORDERS W/O C.C.	5.6	23	.68030
018	CRANIAL & PERIPHERAL NERVE DISORDERS AGE >=70 AND/OR C.C.	6.1	23	.75670
019	CRANIAL & PERIPHERAL NERVE DISORDERS AGE <70 W/O C.C.	5.3	22	.65480
020	NERVOUS SYSTEM INFECTION EXCEPT VIRAL MENINGITIS	7.8	25	1.40900
021	VIRAL MENINGITIS	7.9	25	1.31440
022	HYPERTENSIVE ENCEPHALOPATHY	5.0	20	.70870
023	NONTRAUMATIC STUPOR & COMA	5.2	22	1.12420
024	SEIZURE & HEADACHE AGE >=70 AND/OR C.C.	5.0	22	.76440
025	SEIZURE & HEADACHE AGE 18-69 W/O C.C.	4.0	18	.55220
026	SEIZURE & HEADACHE AGE 0-17	2.7	14	.62550
027	TRAUMATIC STUPOR & COMA, COMA >1 HR	4.7	22	1.56480
028	TRAUMATIC STUPOR & COMA, COMA <1 HR AGE >=70 AND/OR C.C.	5.0	22	.94220
029	TRAUMATIC STUPOR & COMA <1 HR AGE 18-69 W/O C.C.	3.6	21	.64620
030	TRAUMATIC STUPOR & COMA <1 HR AGE 0-17	2.0	8	.35390
031	CONCUSSION AGE >=70 AND/OR C.C.	3.9	20	.53830
032	CONCUSSION AGE 18-69 W/O C.C.	2.9	14	.40640
033	CONCUSSION AGE 0-17	1.6	5	.24570
034	OTHER DISORDERS OF NERVOUS SYSTEM AGE >=70 AND/OR C.C.	6.1	23	.97770
035	OTHER DISORDERS OF NERVOUS SYSTEM AGE <70 W/O C.C.	4.9	22	.73840
036	RETINAL PROCEDURES	4.1	12	.71030
037	ORBITAL PROCEDURES	3.2	12	.66880
038	PRIMARY IRIS PROCEDURES	2.4	8	.39900
039	LENS PROCEDURES WITH OR WITHOUT VITRECTOMY	2.1	4	.57210
040	EXTRAOCULAR PROCEDURES EXCEPT ORBIT AGE >=18	2.1	6	.41290
041	EXTRAOCULAR PROCEDURES EXCEPT ORBIT AGE 0-17	1.6	4	.36570
042	INTRAOCULAR PROCEDURES EXCEPT RETINA, IRIS & LENS	3.0	10	.65430
043	HYPHEMA	3.7	13	.34620
044	ACUTE MAJOR EYE INFECTIONS	5.9	21	.63970
045	NEUROLOGICAL EYE DISORDERS	3.6	14	.54090
046	OTHER DISORDERS OF THE EYE AGE >=18 WITH C.C.	3.7	21	.60100
047	OTHER DISORDERS OF THE EYE AGE >=18 W/O C.C.	2.5	11	.41920
048	OTHER DISORDERS OF THE EYE AGE 0-17	2.9	13	.40180
049	MAJOR HEAD & NECK PROCEDURES	13.1	30	2.87450
050	SIALOADENECTOMY	3.7	11	.70340
051	SALIVARY GLAND PROCEDURES EXCEPT SIALOADENECTOMY	3.3	10	.58870
052	CLEFT LIP & PALATE REPAIR	3.5	13	.69560
053	SINUS & MASTOID PROCEDURES AGE >=18	3.0	10	.61760
054	SINUS & MASTOID PROCEDURES AGE 0-17	3.2	11	.68890

DRG	DESCRIPTION	GEO MEAN DAY	TRIM DAY	WEIGHT
055	MISCELLANEOUS EAR, NOSE & THROAT PROCEDURES	2.1	6	.43420
056	RHINOPLASTY	2.3	7	.43580
057	T&A PROC EXCEPT TONSILLECTOMY &/OR ADENOIDECTOMY AGE >=18	3.7	20	.77180
058	T&A PROC EXCEPT TONSILLECTOMY &/OR ADENOIDECTOMY AGE 0-17	1.5	3	.30970
059	TONSILLECTOMY AND/OR ADENOIDECTOMY AGE >=18	2.3	7	.41320
060	TONSILLECTOMY AND/OR ADENOIDECTOMY AGE 0-17	1.5	3	.26160
061	MYRINGOTOMY WITH TUBAL INSERTION AGE >=18	2.0	8	.42740
062	MYRINGOTOMY WITH TUBAL INSERTION AGE 0-17	1.3	3	.30890
063	OTHER EAR, NOSE & THROAT O.R. PROCEDURES	5.1	22	1.16190
064	EAR, NOSE & THROAT MALIGNANCY	4.8	22	.97690
065	DYSEQUILIBRIUM	3.8	14	.44990
066	EPISTAXIS	3.3	13	.41460
067	EPIGLOTTITIS	4.8	21	.93640
068	OTITIS MEDIA & URI AGE >=70 AND/OR C.C.	5.1	17	.60920
069	OTITIS MEDIA & URI AGE 18-69 W/O C.C.	4.1	14	.50400
070	OTITIS MEDIA & URI AGE 0-17	3.3	12	.52510
071	LARYNGOTRACHEITIS	4.6	18	.65940
072	NASAL TRAUMA & DEFORMITY	3.5	19	.52170
073	OTHER EAR, NOSE & THROAT DIAGNOSES AGE >=18	3.4	18	.60490
074	OTHER EAR, NOSE & THROAT DIAGNOSES AGE 0-17	2.1	9	.34270
075	MAJOR CHEST PROCEDURES	13.4	30	2.97800
076	OTHER RESPIRATORY SYSTEM O.R. PROCEDURES WITH C.C.	10.3	27	2.56670
077	OTHER RESPIRATORY SYSTEM O.R. PROCEDURES W/O C.C.	7.0	24	1.67350
078	PULMONARY EMBOLISM	9.5	27	1.48020
079	RESPIRATORY INFECTIONS & INFLAMMATIONS AGE >=70 AND/OR C.C.	9.6	27	1.95460
080	RESPIRATORY INFECTIONS & INFLAMMATIONS AGE 18-69 W/O C.C.	8.5	26	1.44030
081	RESPIRATORY INFECTIONS & INFLAMMATIONS AGE 0-17	6.1	23	.86520
082	RESPIRATORY NEOPLASMS	6.6	24	1.12590
083	MAJOR CHEST TRAUMA AGE >=70 AND/OR C.C.	6.6	24	.83980
084	MAJOR CHEST TRAUMA AGE <70 W/O C.C.	4.6	19	.59210
085	PLEURAL EFFUSION AGE >=70 AND/OR C.C.	7.2	24	1.11980
086	PLEURAL EFFUSION AGE <70 W/O C.C.	5.9	23	.97610
087	PULMONARY EDEMA & RESPIRATORY FAILURE	7.0	24	1.80780
088	CHRONIC OBSTRUCTIVE PULMONARY DISEASE	6.6	24	1.07690
089	SIMPLE PNEUMONIA & PLEURISY AGE >=70 AND/OR C.C.	7.5	25	1.17680
090	SIMPLE PNEUMONIA & PLEURISY AGE 18-69 W/O C.C.	6.2	22	.89000
091	SIMPLE PNEUMONIA & PLEURISY AGE 0-17	4.4	19	.82160
092	INTERSTITIAL LUNG DISEASE AGE >=70 AND/OR C.C.	6.8	24	1.11170
093	INTERSTITIAL LUNG DISEASE AGE <70 W/O C.C.	5.4	22	.86420
094	PNEUMOTHORAX AGE >=70 AND/OR C.C.	7.6	25	1.30440
095	PNEUMOTHORAX AGE <70 W/O C.C.	5.9	23	.87970
096	BRONCHITIS & ASTHMA AGE >=70 AND/OR C.C.	6.0	20	.84880
097	BRONCHITIS & ASTHMA AGE 18-69 W/O C.C.	5.1	17	.70920
098	BRONCHITIS & ASTHMA AGE 0-17	3.8	12	.72020
099	RESPIRATORY SIGNS & SYMPTOMS AGE >=70 AND/OR C.C.	4.6	22	.80780
100	RESPIRATORY SIGNS & SYMPTOMS AGE <70 W/O C.C.	3.6	16	.62550
101	OTHER RESPIRATORY DIAGNOSES AGE >=70 AND/OR C.C.	5.5	23	.84610
102	OTHER RESPIRATORY DIAGNOSES AGE <70 WITHOUT C.C.	4.3	21	.68430
103	HEART TRANSPLANT	.0	0	
104	CARDIAC VALVE PROCEDURE WITH PUMP & WITH CARDIAC CATH	18.0	35	7.31610
105	CARDIAC VALVE PROCEDURE WITH PUMP & W/O CARDIAC CATH	15.0	32	6.34000
106	CORONARY BYPASS WITH CARDIAC CATH	14.7	32	5.33320
107	CORONARY BYPASS W/O CARDIAC CATH	12.7	30	4.66140
108	OTHER CARDIOVASCULAR OR THORACIC PROC, WITH PUMP	10.6	28	4.78100

DRG DATA AS OF 10/1/85

DRG	DESCRIPTION	GEO MEAN DAY	TRIM DAY	WEIGHT
109	CARDIOTHORACIC PROCEDURES W/O PUMP	9.0	26	4.35970
110	MAJOR RECONSTRUCTIVE VASCULAR PROCEDURES AGE >=70 AND/OR C.C.	13.1	30	3.32150
111	MAJOR RECONSTRUCTIVE VASCULAR PROCEDURES AGE <70 W/O C.C.	11.2	28	2.45610
112	VASCULAR PROCEDURES EXCEPT MAJOR RECONSTRUCTION W/O PUMP	8.1	25	2.22390
113	AMPUTATION FOR CIRC SYSTEM DISORDERS EXCEPT UPPER LIMB & TOE	17.2	34	2.54060
114	UPPER LIMB & TOE AMPUTATION FOR CIRC SYSTEM DISORDERS	12.4	29	1.89460
115	PERM CARDIAC PACEMAKER IMPLANT WITH AMI, HEART FAILURE OR SHOCK	13.9	31	4.16340
116	PERM CARDIAC PACEMAKER IMPLANT W/O AMI, HEART FAILURE OR SHOCK	7.8	25	2.97090
117	CARDIAC PACEMAKER REPLACE & REVIS EXC PULSE GEN REPL ONLY	4.8	20	1.46680
118	CARDIAC PACEMAKER PULSE GENERATOR REPLACEMENT ONLY	3.4	14	1.87800
119	VEIN LIGATION & STRIPPING	5.6	23	.91650
120	OTHER CIRCULATORY SYSTEM O.R. PROCEDURES	11.4	28	2.25800
121	CIRCULATORY DISORDERS WITH AMI & C.V. COMP. DISCH. ALIVE	10.3	27	1.76140
122	CIRCULATORY DISORDERS WITH AMI W/O C.V. COMP. DISCH. ALIVE	8.8	26	1.32700
123	CIRCULATORY DISORDERS WITH AMI, EXPIRED	3.0	20	1.35250
124	CIRCULATORY DISORDERS EXC AMI,WITH CARD CATH & COMPLEX DIAG	5.0	22	1.25530
125	CIRCULATORY DISORDERS EXC AMI,WITH CARD CATH W/O COMPLEX DIAG	2.8	11	.72660
126	ACUTE & SUBACUTE ENDOCARDITIS	18.1	35	2.98400
127	HEART FAILURE & SHOCK	6.8	24	1.01000
128	DEEP VEIN THROMBOPHLEBITIS	8.6	24	.84560
129	CARDIAC ARREST, UNEXPLAINED	3.8	21	1.72000
130	PERIPHERAL VASCULAR DISORDERS AGE >=70 AND/OR C.C.	5.7	23	.82540
131	PERIPHERAL VASCULAR DISORDERS AGE <70 W/O C.C.	4.5	22	.67120
132	ATHEROSCLEROSIS AGE >=70 AND/OR C.C.	5.3	22	.80400
133	ATHEROSCLEROSIS AGE <70 W/O C.C.	3.8	16	.70500
134	HYPERTENSION	5.1	20	.63650
135	CARDIAC CONGENITAL & VALVULAR DISORDERS AGE >=70 AND/OR C.C.	5.3	22	.89360
136	CARDIAC CONGENITAL & VALVULAR DISORDERS AGE 18-69 W/O C.C.	3.8	18	.75260
137	CARDIAC CONGENITAL & VALVULAR DISORDERS AGE 0-17	3.3	20	.63150
138	CARDIAC ARRHYTHMIA & CONDUCTION DISORDERS AGE >=70 AND/OR C.C.	4.9	21	.81380
139	CARDIAC ARRHYTHMIA & CONDUCTION DISORDERS AGE <70 W/O C.C.	3.9	16	.65170
140	ANGINA PECTORIS	4.6	16	.68950
141	SYNCOPE & COLLAPSE AGE >=70 AND/OR C.C.	4.4	18	.61380
142	SYNCOPE & COLLAPSE AGE <70 W/O C.C.	3.6	14	.53350
143	CHEST PAIN	3.5	13	.58950
144	OTHER CIRCULATORY DIAGNOSES WITH C.C.	6.2	23	1.11580
145	OTHER CIRCULATORY DIAGNOSES W/O C.C.	5.0	22	.84770
146	RECTAL RESECTION AGE >=70 AND/OR C.C.	16.6	34	3.07550
147	RECTAL RESECTION AGE <70 W/O C.C.	14.0	31	2.27370
148	MAJOR SMALL & LARGE BOWEL PROCEDURES AGE >=70 AND/OR C.C.	15.3	32	2.94070
149	MAJOR SMALL & LARGE BOWEL PROCEDURES AGE <70 W/O C.C.	12.6	30	2.10720
150	PERITONEAL ADHESIOLYSIS AGE >=70 AND/OR C.C.	12.8	30	2.34280
151	PERITONEAL ADHESIOLYSIS AGE <70 W/O C.C.	10.1	27	1.59020
152	MINOR SMALL & LARGE BOWEL PROCEDURES AGE >=70 AND/OR C.C.	8.6	26	1.40690
153	MINOR SMALL & LARGE BOWEL PROCEDURES AGE <70 W/O C.C.	7.3	24	1.09930
154	STOMACH, ESOPHAGEAL & DUODENAL PROCEDURES AGE >=70 AND/OR C.C.	11.5	29	2.68800
155	STOMACH, ESOPHAGEAL & DUODENAL PROCEDURES AGE 18-69 W/O C.C.	8.9	26	1.79060
156	STOMACH, ESOPHAGEAL & DUODENAL PROCEDURES AGE 0-17	6.0	20	.83820
157	ANAL AND STOMAL PROCEDURES AGE >=70 AND/OR C.C.	4.8	21	.73020
158	ANAL AND STOMAL PROCEDURES AGE <70 W/O C.C.	3.9	14	.55130
159	HERNIA PROCEDURES EXCEPT INGUINAL & FEMORAL AGE >=70 AND/OR C.C.	6.3	22	1.00000
160	HERNIA PROCEDURES EXCEPT INGUINAL & FEMORAL AGE 18-69 W/O C.C.	5.0	16	.74570
161	INGUINAL & FEMORAL HERNIA PROCEDURES AGE >=70 AND/OR C.C.	4.4	14	.65380
162	INGUINAL & FEMORAL HERNIA PROCEDURES AGE 18-69 W/O C.C.	3.6	10	.52640

DRG	DESCRIPTION	GEO MEAN DAY	TRIM DAY	WEIGHT
163	HERNIA PROCEDURES AGE 0-17	4.2	18	.96480
164	APPENDECTOMY WITH COMPLICATED PRINC. DIAG AGE>=70 AND/OR C.C.	10.7	28	2.06490
165	APPENDECTOMY WITH COMPLICATED PRINC. DIAG AGE <70 W/O C.C.	8.4	19	1.43790
166	APPENDECTOMY W/O COMPLICATED PRINC. DIAG AGE >=70 AND/OR C.C.	7.5	23	1.36060
167	APPENDECTOMY W/O COMPLICATED PRINC. DIAG AGE <70 W/O C.C.	5.3	13	.88550
168	PROCEDURES ON THE MOUTH AGE >=70 AND/OR C.C.	4.0	21	.91880
169	PROCEDURES ON THE MOUTH AGE <70 W/O C.C.	3.0	12	.65850
170	OTHER DIGESTIVE SYSTEM PROCEDURES AGE >=70 AND/OR C.C.	12.3	29	2.76150
171	OTHER DIGESTIVE SYSTEM PROCEDURES AGE <70 W/O C.C.	9.8	27	2.33050
172	DIGESTIVE MALIGNANCY AGE >=70 AND/OR C.C.	6.7	24	1.07490
173	DIGESTIVE MALIGNANCY AGE <70 W/O C.C.	5.4	22	.96040
174	G.I. HEMORRHAGE AGE >=70 AND/OR C.C.	5.8	23	.90750
175	G.I. HEMORRHAGE AGE <70 W/O C.C.	4.7	18	.70690
176	COMPLICATED PEPTIC ULCER	6.3	23	.93180
177	UNCOMPLICATED PEPTIC ULCER >=70 AND/OR C.C.	5.4	18	.66170
178	UNCOMPLICATED PEPTIC ULCER <70 W/O C.C.	4.6	15	.55560
179	INFLAMMATORY BOWEL DISEASE	7.1	24	.98770
180	G.I. OBSTRUCTION AGE >=70 AND/OR C.C.	5.4	22	.75840
181	G.I. OBSTRUCTION AGE <70 W/O C.C.	4.5	18	.58280
182	ESOPHAGITIS,GASTROENT.& MISC. DIGEST. DIS AGE >=70 &/OR C.C.	4.8	18	.60340
183	ESOPHAGITIS,GASTROENT.& MISC. DIGEST. DIS AGE 18-69 W/O C.C.	4.0	15	.51070
184	ESOPHAGITIS, GASTROENTERITIS & MISC. DIGEST. DISORDERS AGE 0-17	2.6	12	.48280
185	DENTAL & ORAL DIS. EXC EXTRACTIONS & RESTORATIONS,AGE >=18	4.3	21	.71470
186	DENTAL & ORAL DIS. EXC EXTRACTIONS & RESTORATIONS,AGE 0-17	2.9	11	.41120
187	DENTAL EXTRACTIONS & RESTORATIONS	2.3	7	.42110
188	OTHER DIGESTIVE SYSTEM DIAGNOSES AGE >=70 AND/OR C.C.	4.3	21	.71730
189	OTHER DIGESTIVE SYSTEM DIAGNOSES AGE 18-69 W/O C.C.	3.3	17	.52720
190	OTHER DIGESTIVE SYSTEM DIAGNOSES AGE 0-17	4.3	21	.91780
191	MAJOR PANCREAS, LIVER & SHUNT PROCEDURES	18.1	35	4.46080
192	MINOR PANCREAS, LIVER & SHUNT PROCEDURES	16.7	34	4.04420
193	BILIARY TRACT PROC EXC TOT CHOLECYSTECTOMY AGE >=70 &/OR C.C.	15.7	33	2.81200
194	BILIARY TRACT PROC EXC TOT CHOLECYSTECTOMY AGE <70 W/O C.C.	12.3	29	2.12060
195	TOTAL CHOLECYSTECTOMY WITH C.D.E. AGE >=70 AND/OR C.C.	13.1	30	2.27270
196	TOTAL CHOLECYSTECTOMY WITH C.D.E. AGE <70 W/O C.C.	10.3	22	1.59760
197	TOTAL CHOLECYSTECTOMY W/O C.D.E. AGE >=70 AND/OR C.C.	10.5	27	1.70580
198	TOTAL CHOLECYSTECTOMY W/O C.D.E. AGE <70 W/O C.C.	8.0	17	1.14000
199	HEPATOBILIARY DIAGNOSTIC PROCEDURE FOR MALIGNANCY	14.2	31	2.33780
200	HEPATOBILIARY DIAGNOSTIC PROCEDURE FOR NON-MALIGNANCY	10.9	28	2.62860
201	OTHER HEPATOBILIARY OR PANCREAS O.R. PROCEDURES	10.4	27	2.71300
202	CIRRHOSIS & ALCOHOLIC HEPATITIS	7.8	25	1.16650
203	MALIGNANCY OF HEPATOBILIARY SYSTEM OR PANCREAS	6.9	24	1.03390
204	DISORDERS OF PANCREAS EXCEPT MALIGNANCY	6.5	24	.97030
205	DISORDERS OF LIVER EXC MALIG,CIRR,ALC HEPA AGE >=70 AND/OR C.C.	6.7	24	1.07200
206	DISORDERS OF LIVER EXC MALIG,CIRR,ALC HEPA AGE <70 W/O C.C.	5.0	22	.77350
207	DISORDERS OF THE BILIARY TRACT AGE >=70 AND/OR C.C.	5.4	22	.77750
208	DISORDERS OF THE BILIARY TRACT AGE <70 W/O C.C.	4.0	16	.57940
209	MAJOR JOINT AND LIMB REATTACHMENT PROCEDURES	14.4	31	2.39300
210	HIP & FEMUR PROCEDURES EXCEPT MAJOR JOINT AGE >=70 AND/OR C.C.	14.6	32	2.03200
211	HIP & FEMUR PROCEDURES EXCEPT MAJOR JOINT AGE 18-69 W/O C.C.	12.7	30	1.78670
212	HIP & FEMUR PROCEDURES EXCEPT MAJOR JOINT AGE 0-17	8.3	23	1.66090
213	AMPUTATIONS FOR MUSCULOSKELETAL SYSTEM & CONN. TISSUE DISORDERS	12.1	29	1.97530
214	BACK & NECK PROCEDURES AGE >=70 AND/OR C.C.	13.1	30	1.87760
215	BACK & NECK PROCEDURES AGE <70 W/O C.C.	10.2	27	1.42810
216	BIOPSIES OF MUSCULOSKELETAL SYSTEM & CONNECTIVE TISSUE	8.9	26	1.55660

DRG DATA AS OF 10/1/85

DRG	DESCRIPTION	GEO MEAN DAY	TRIM DAY	WEIGHT
217	WND DEBRID & SKN GRFT EXC HAND,FOR MUSCSKELETAL & CONN.TISS.DIS	11.2	28	2.31000
218	LOWER EXTREM & HUMER PROC EXC HIP,FOOT,FEMUR AGE >=70 &/OR C.C.	6.9	26	1.37980
219	LOWER EXTREM & HUMER PROC EXC HIP,FOOT,FEMUR AGE 18-69 W/O C.C.	6.7	22	1.04370
220	LOWER EXTREM & HUMER PROC EXC HIP,FOOT,FEMUR AGE 0-17	5.3	22	.92420
221	KNEE PROCEDURES AGE >=70 AND/OR C.C.	4.7	22	.97580
222	KNEE PROCEDURES AGE <70 W/O C.C.	3.4	15	.71130
223	UPPER EXTREMITY PROC EXC HUMERUS & HAND AGE >=70 AND/OR C.C.	5.3	22	.98530
224	UPPER EXTREMITY PROC EXC HUMERUS & HAND AGE <70 W/O C.C.	4.1	15	.78910
225	FOOT PROCEDURES	3.9	13	.65200
226	SOFT TISSUE PROCEDURES AGE >=70 AND/OR C.C.	5.4	22	.98110
227	SOFT TISSUE PROCEDURES AGE <70 W/O C.C.	3.8	17	.68720
228	GANGLION (HAND) PROCEDURES	1.9	5	.36610
229	HAND PROCEDURES EXCEPT GANGLION	2.9	12	.62120
230	LOCAL EXCISION & REMOVAL OF INT FIX DEVICES OF HIP & FEMUR	6.1	23	1.05550
231	LOCAL EXCISION & REMOVAL OF INT FIX DEVICES EXCEPT HIP & FEMUR	3.8	19	.75160
232	ARTHROSCOPY	3.2	14	.67060
233	OTHER MUSCULOSKELET SYS & CONN TISS O.R. PROC AGE >=70 &/OR C.C.	8.1	25	1.37230
234	OTHER MUSCULOSKELET SYS & CONN TISS O.R. PROC AGE <70 W/O C.C.	5.3	22	.94570
235	FRACTURES OF FEMUR	10.1	27	1.41370
236	FRACTURES OF HIP & PELVIS	8.8	26	1.07140
237	SPRAINS, STRAINS, & DISLOCATIONS OF HIP, PELVIS & THIGH	5.4	22	.60490
238	OSTEOMYELITIS	11.1	28	1.64700
239	PATHOLOGICAL FRACTURES & MUSCULOSKELETAL & CONN.TISS.MALIGNANCY	8.0	25	.92720
240	CONNECTIVE TISSUE DISORDERS AGE >=70 AND/OR C.C.	7.3	24	.90490
241	CONNECTIVE TISSUE DISORDERS AGE <70 W/O C.C.	6.2	23	.74920
242	SEPTIC ARTHRITIS	9.7	27	1.45620
243	MEDICAL BACK PROBLEMS	6.2	23	.68430
244	BONE DISEASES & SEPTIC ARTHROPATHY AGE >=70 AND/OR C.C.	6.1	23	.67480
245	BONE DISEASES & SEPTIC ARTHROPATHY AGE <70 W/O C.C.	5.1	22	.64070
246	NON-SPECIFIC ARTHROPATHIES	5.4	21	.59360
247	SIGNS & SYMPTOMS OF MUSCULOSKELETAL SYSTEM & CONN TISSUE	4.7	21	.57970
248	TENDONITIS, MYOSITIS & BURSITIS	4.8	20	.58920
249	AFTERCARE, MUSCULOSKELETAL SYSTEM & CONNECTIVE TISSUE	5.6	23	.78990
250	FX,SPRNS,STRNS & DISL OF FOREARM,HAND,FOOT AGE >=70 &/OR C.C.	3.8	20	.51620
251	FX,SPRNS,STRNS & DISL OF FOREARM,HAND,FOOT AGE 18-69 W/O C.C.	2.5	11	.40040
252	FX,SPRNS,STRNS & DISL OF FOREARM,HAND,FOOT AGE 0-17	1.8	7	.34960
253	FX,SPRNS,STRNS & DISL OF UPARM,LOWLEG EX FOOT AGE >=70 &/OR C.C.	5.4	22	.63230
254	FX,SPRNS,STRNS & DISL OF UPARM,LOWLEG EX FOOT AGE 18-69 W/O C.C.	4.0	20	.49310
255	FX,SPRNS,STRNS & DISL OF UPARM,LOWLEG EX FOOT AGE 0-17	2.9	15	.46380
256	OTHER DIAGNOSES OF MUSCULOSKELETAL SYSTEM & CONNECTIVE TISSUE	4.9	22	.69930
257	TOTAL MASTECTOMY FOR MALIGNANCY AGE >=70 AND/OR C.C.	7.8	19	1.06340
258	TOTAL MASTECTOMY FOR MALIGNANCY AGE <70 W/O C.C.	6.9	16	.96980
259	SUBTOTAL MASTECTOMY FOR MALIGNANCY AGE >=70 AND/OR C.C.	4.9	22	.86050
260	SUBTOTAL MASTECTOMY FOR MALIGNANCY AGE <70 W/O C.C.	3.5	15	.66610
261	BREAST PROC FOR NON-MALIG EXCEPT BIOPSY & LOC EXC	3.3	11	.61040
262	BREAST BIOPSY & LOCAL EXCISION FOR NON-MALIGNANCY	2.3	6	.42520
263	SKIN GRAFTS &/OR DEBRID ULCER OR CELLULITIS AGE >=70 &/OR C.C.	16.1	33	2.41770
264	SKIN GRAFTS &/OR DEBRID ULCER OR CELLULITIS AGE <70 W/O C.C.	14.9	32	2.18020
265	SKIN GRAFTS &/OR DEBRID EXC SKIN ULCER OR CELLULITIS WITH C.C.	7.6	25	1.39930
266	SKIN GRAFTS &/OR DEBRID EXC SKIN ULCER OR CELLULITIS W/O C.C.	4.0	21	.73130
267	PERIANAL & PILONIDAL PROCEDURES	4.0	17	.63620
268	SKIN,SUBCUTANEOUS TISSUE & BREAST PLASTIC PROCEDURES	2.8	12	.56900
269	OTHER SKIN, SUBCUT TISS & BREAST O.R. PROC AGE >=70 &/OR C.C.	5.5	23	1.13380
270	OTHER SKIN, SUBCUT TISS & BREAST O.R. PROC AGE <70 W/O C.C.	3.8	21	.76230

DRG	DESCRIPTION	GEO MEAN DAY	TRIM DAY	WEIGHT
271	SKIN ULCERS	10.1	27	1.26090
272	MAJOR SKIN DISORDERS AGE >=70 AND/OR C.C.	7.2	24	.85230
273	MAJOR SKIN DISORDERS AGE <70 W/O C.C.	6.5	24	.79720
274	MALIGNANT BREAST DISORDERS AGE >=70 AND/OR C.C.	7.0	24	1.03680
275	MALIGNANT BREAST DISORDERS AGE <70 W/O C.C.	5.8	23	.98820
276	NON-MALIGANT BREAST DISORDERS	3.4	19	.56760
277	CELLULITIS AGE >=70 AND/OR C.C.	7.3	24	.88660
278	CELLULITIS AGE 18-69 W/O C.C.	6.2	23	.75940
279	CELLULITIS AGE 0-17	4.2	13	.47390
280	TRAUMA TO THE SKIN, SUBCUT TISS & BREAST AGE >=70 &/OR C.C.	4.6	22	.54170
281	TRAUMA TO THE SKIN, SUBCUT TISS & BREAST AGE 18-69 W/O C.C.	3.4	16	.44680
282	TRAUMA TO THE SKIN, SUBCUT TISS & BREAST AGF 0-17	2.2	9	.34240
283	MINOR SKIN DISORDERS AGE >=70 AND/OR C.C.	5.0	22	.63680
284	MINOR SKIN DISORDERS AGE <70 W/O C.C.	3.7	18	.51720
285	AMPUTATION OF LOWER LIMB FOR ENDOCRINE,NUTRITIONAL&METABOLIC DIS	21.5	39	3.27240
286	ADRENAL & PITUITARY PROCEDURES	13.3	30	2.67310
287	SKIN GRAFTS & WOUND DEBRIDE FOR ENDOC,NUTRIT & METAB DISORDERS	15.7	33	2.37810
288	O.R. PROCEDURES FOR OBESITY	9.7	27	2.11300
289	PARATHYROID PROCEDURES	6.9	24	1.33080
290	THYROID PROCEDURES	5.0	14	.85630
291	THYROGLOSSAL PROCEDURES	3.4	11	.60730
292	OTHER ENDOCRINE, NUTRIT & METAB O.R. PROC AGE >70 &/OR C.C.	11.3	28	2.31310
293	OTHER ENDOCRINE, NUTRIT & METAB O.R. PROC AGE <70 W/O C.C.	8.2	25	1.79620
294	DIABETES AGE >=36	6.7	24	.74540
295	DIABETES AGE 0-35	5.0	22	.78860
296	NUTRITIONAL & MISC. METABOLIC DISORDERS AGE >=70 AND/OR C.C.	6.1	23	.82710
297	NUTRITIONAL & MISC. METABOLIC DISORDERS AGE 18-69 W/O C.C.	4.9	22	.69980
298	NUTRITIONAL & MISC. METABOLIC DISORDERS AGE 0-17	3.3	18	.72020
299	INBORN ERRORS OF METABOLISM	5.3	22	.80800
300	ENDOCRINE DISORDERS AGE >=70 AND/OR C.C.	6.9	24	.93490
301	ENDOCRINE DISORDERS AGE <70 W/O C.C.	5.1	22	.68820
302	KIDNEY TRANSPLANT	21.3	38	4.62730
303	KIDNEY,URETER & MAJOR BLADDER PROCEDURE FOR NEOPLASM	14.2	31	2.76100
304	KIDNEY,URETER & MAJ BLDR PROC FOR NON-MALIG AGE >=70 &/OR C.C.	10.8	28	2.03230
305	KIDNEY,URETER & MAJ BLDR PROC FOR NON-MALIG AGE <70 W/O C.C.	8.4	25	1.48940
306	PROSTATECTOMY AGE >=70 AND/OR C.C.	8.1	25	1.25950
307	PROSTATECTOMY AGE <70 W/O C.C.	6.5	19	.95870
308	MINOR BLADDER PROCEDURES AGE >=70 AND/OR C.C.	6.1	23	1.14900
309	MINOR BLADDER PROCEDURES AGE <70 W/O C.C.	4.7	22	.86650
310	TRANSURETHRAL PROCEDURES AGE >=70 AND/OR C.C.	4.3	17	.72660
311	TRANSURETHRAL PROCEDURES AGE <70 W/O C.C.	3.3	11	.55630
312	URETHRAL PROCEDURES, AGE >=70 AND/OR C.C.	4.4	18	.73080
313	URETHRAL PROCEDURES, AGE 18-69 W/O C.C.	3.5	14	.59360
314	URETHRAL PROCEDURES, AGE 0-17	2.3	11	.43230
315	OTHER KIDNEY & URINARY TRACT O.R. PROCEDURES	9.8	27	2.77600
316	RENAL FAILURE	6.4	23	1.32120
317	ADMIT FOR RENAL DIALYSIS	2.3	10	.49070
318	KIDNEY & URINARY TRACT NEOPLASMS AGE >=70 AND/OR C.C.	5.5	23	.92310
319	KIDNEY & URINARY TRACT NEOPLASMS AGE <70 W/O C.C.	3.8	21	.74180
320	KIDNEY & URINARY TRACT INFECTIONS AGE >=70 AND/OR C.C.	6.5	24	.86290
321	KIDNEY & URINARY TRACT INFECTIONS AGE 18-69 W/O C.C.	5.1	19	.67530
322	KIDNEY & URINARY TRACT INFECTIONS AGE 0-17	5.2	19	.69980
323	URINARY STONES AGE >=70 AND/OR C.C.	3.7	17	.58630
324	URINARY STONES AGE <70 W/O C.C.	2.8	11	.40980

DRG DATA AS OF 10/1/85

DRG	DESCRIPTION	GEO MEAN DAY	TRIM DAY	WEIGHT
325	KIDNEY & URINARY TRACT SIGNS & SYMPTOMS AGE >=70 AND/OR C.C.	4.6	22	.65040
326	KIDNEY & URINARY TRACT SIGNS & SYMPTOMS AGE 18-69 W/O C.C.	3.5	16	.51590
327	KIDNEY & URINARY TRACT SIGNS & SYMPTOMS AGE 0-17	3.3	20	.55110
328	URETHRAL STRICTURE AGE >=70 AND/OR C.C.	4.0	18	.59390
329	URETHRAL STRICTURE AGE 18-69 W/O C.C.	3.0	12	.48700
330	URETHRAL STRICTURE AGE 0-17	1.6	5	.27880
331	OTHER KIDNEY & URINARY TRACT DIAGNOSES AGE >=70 AND/OR C.C.	5.4	22	.83330
332	OTHER KIDNEY & URINARY TRACT DIAGNOSES AGE 18-69 W/O C.C.	4.1	21	.67400
333	OTHER KIDNEY & URINARY TRACT DIAGNOSES AGE 0-17	3.7	21	.79150
334	MAJOR MALE PELVIC PROCEDURES WITH C.C.	12.3	28	1.80380
335	MAJOR MALE PELVIC PROCEDURES W/O C.C.	11.0	23	1.46440
336	TRANSURETHRAL PROSTATECTOMY AGE >=70 AND/OR C.C.	7.0	18	.98710
337	TRANSURETHRAL PROSTATECTOMY AGE <70 W/O C.C.	5.8	12	.77880
338	TESTES PROCEDURES, FOR MALIGNANCY	4.9	22	.89070
339	TESTES PROCEDURES, NON-MALIGNANT AGE >=18	3.4	12	.57660
340	TESTES PROCEDURES, NON-MALIGNANT AGE 0-17	2.4	7	.43350
341	PENIS PROCEDURES	5.3	16	.99740
342	CIRCUMCISION AGE >=18	2.4	8	.42660
343	CIRCUMCISION AGE 0-17	1.7	4	.37880
344	OTHER MALE REPRODUCTIVE SYSTEM O.R. PROCEDURES FOR MALIGNANCY	6.3	23	1.12160
345	OTHER MALE REPRODUCTIVE SYSTEM O.R. PROC EXCEPT FOR MALIG	4.8	22	.81960
346	MALIGNANCY, MALE REPRODUCTIVE SYSTEM, AGE >=70 AND/OR C.C.	5.6	23	.85690
347	MALIGNANCY, MALE REPRODUCTIVE SYSTEM, AGE <70 W/O C.C.	3.7	21	.64410
348	BENIGN PROSTATIC HYPERTROPHY AGE >=70 AND/OR C.C.	3.9	19	.62600
349	BENIGN PROSTATIC HYPERTROPHY AGE <70 W/O C.C.	2.9	12	.48540
350	INFLAMMATION OF THE MALE REPRODUCTIVE SYSTEM	4.8	17	.62700
351	STERILIZATION, MALE	1.6	5	.33340
352	OTHER MALE REPRODUCTIVE SYSTEM DIAGNOSES	3.3	16	.53880
353	PELVIC EVISCERATION, RADICAL HYSTERECTOMY & VULVECTOMY	10.8	28	1.88180
354	NON-RADICAL HYSTERECTOMY AGE >=70 AND/OR C.C.	8.8	19	1.23350
355	NON-RADICAL HYSTERECTOMY AGE <70 W/O C.C.	7.4	13	.97670
356	FEMALE REPRODUCTIVE SYSTEM RECONSTRUCTIVE PROCEDURES	7.0	15	.85110
357	UTERUS & ADENEXA PROCEDURES, FOR MALIGNANCY	12.3	29	2.11010
358	UTERUS & ADENEXA PROC FOR NON-MALIGNANCY EXCEPT TUBAL INTERRUPT	6.9	24	1.11850
359	INCISIONAL TUBAL INTERRUPTION FOR NON-MALIGNANCY	2.7	9	.50440
360	VAGINA, CERVIX & VULVA PROCEDURES	3.4	16	.60550
361	LAPAROSCOPY & ENDOSCOPY (FEMALE) EXCEPT TUBAL INTERRUPTION	3.2	17	.70630
362	LAPAROSCOPIC TUBAL INTERRUPTION	1.8	4	.35960
363	D&C,CONIZATION & RADIO-IMPLANT, FOR MALIGNANCY	3.6	15	.61760
364	D&C,CONIZATION EXCEPT FOR MALIGNANCY	2.3	7	.39220
365	OTHER FEMALE REPRODUCTIVE SYSTEM O.R. PROCEDURES	10.9	28	1.90860
366	MALIGNANCY, FEMALE REPRODUCTIVE SYSTEM AGE >=70 AND/OR C.C.	4.9	22	.86260
367	MALIGNANCY, FEMALE REPRODUCTIVE SYSTEM AGE <70 W/O C.C.	2.8	16	.53540
368	INFECTIONS, FEMALE REPRODUCTIVE SYSTEM	5.9	23	.76100
369	MENSTRUAL & OTHER FEMALE REPRODUCTIVE SYSTEM DISORDERS	3.9	20	.54980
370	CESAREAN SECTION WITH C.C.	7.1	16	1.08560
371	CESAREAN SECTION W/O C.C.	5.6	12	.76700
372	VAGINAL DELIVERY WITH COMPLICATING DIAGNOSES	4.0	14	.59450
373	VAGINAL DELIVERY W/O COMPLICATING DIAGNOSES	2.8	7	.35380
374	VAGINAL DELIVERY WITH STERILIZATION AND/OR D&C	3.3	8	.57550
375	VAGINAL DELIVERY WITH O.R. PROC EXCEPT STERIL AND/OR D&C	4.4	15	.68170
376	POSTPARTUM & POSTABORTION DIAGNOSES W/O O.R. PROCEDURE	3.3	16	.45230
377	POSTPARTUM & POSTABORTION DIAGNOSES WITH O.R. PROCEDURE	3.3	15	.78860
378	ECTOPIC PREGNANCY	4.3	14	.73580

DRG	DESCRIPTION	GEO MEAN DAY	TRIM DAY	WEIGHT
379	THREATENED ABORTION	1.9	8	.24090
380	ABORTION W/O D&C	1.9	9	.36090
381	ABORTION WITH D&C, ASPIRATION CURETTAGE, OR HYSTEROTOMY	1.7	5	.37830
382	FALSE LABOR	1.2	3	.11370
383	OTHER ANTEPARTUM DIAGNOSES WITH MEDICAL COMPLICATIONS	3.4	16	.44530
384	OTHER ANTEPARTUM DIAGNOSES W/O MEDICAL COMPLICATIONS	2.6	16	.45860
385	NEONATES, DIED OR TRANSFERRED	1.8	14	.68110
386	EXTREME IMMATURITY, OR RESPIRATORY DISTRESS SYNDROME, NEONATE	17.9	35	3.64800
387	PREMATURITY WITH MAJOR PROBLEMS	13.3	30	1.82670
388	PREMATURITY W/O MAJOR PROBLEMS	8.6	26	1.15710
389	FULL TERM NEONATE WITH MAJOR PROBLEMS	4.7	16	.54250
390	NEONATES WITH OTHER SIGNIFICANT PROBLEMS	3.4	9	.34860
391	NORMAL NEWBORNS	3.1	7	.22180
392	SPLENECTOMY AGE >=18	13.7	31	3.24940
393	SPLENECTOMY AGE 0-17	9.1	26	1.52060
394	OTHER O.R. PROCEDURES OF THE BLOOD & BLOOD FORMING ORGANS	5.0	22	1.08910
395	RED BLOOD CELL DISORDERS AGE >=18	4.7	22	.71530
396	RED BLOOD CELL DISORDERS AGE 0-17	1.3	4	.29520
397	COAGULATION DISORDERS	5.9	23	.99710
398	RETICULOENDOTHELIAL & IMMUNITY DISORDERS AGE >=70 AND/OR C.C.	5.5	23	.97530
399	RETICULOENDOTHELIAL & IMMUNITY DISORDERS AGE <70 W/O C.C.	4.2	21	.72470
400	LYMPHOMA OR LEUKEMIA WITH MAJOR O.R. PROCEDURE	12.8	30	2.66460
401	LYMPHOMA OR LEUKEMIA WITH OTHER O.R. PROC AGE >=70 AND/OR C.C.	8.2	25	1.59020
402	LYMPHOMA OR LEUKEMIA WITH OTHER O.R. PROCEDURE AGE <70 W/O C.C.	5.6	23	1.05550
403	LYMPHOMA OR LEUKEMIA AGE >=70 AND/OR C.C.	6.7	24	1.32790
404	LYMPHOMA OR LEUKEMIA AGE 18-69 W/O C.C.	5.0	22	1.04490
405	LYMPHOMA OR LEUKEMIA AGE 0-17	4.9	22	1.04070
406	MYELOPROLIF DISORD OR POORLY DIFF NEOPLASM W MAJ O.R.PROC & C.C.	12.9	30	2.53070
407	MYELOPROLIF DISORD OR POORLY DIFF NEOPL W MAJ O.R.PROC W/O C.C.	8.6	26	1.71270
408	MYELOPROLIF DISORD OR POORLY DIFF NEOPL WITH OTHER O.R.PROC	5.3	22	1.05020
409	RADIOTHERAPY	7.0	24	.98560
410	CHEMOTHERAPY	2.4	9	.42850
411	HISTORY OF MALIGNANCY W/O ENDOSCOPY	3.8	21	.59070
412	HISTORY OF MALIGNANCY WITH ENDOSCOPY	1.9	6	.33890
413	OTHR MYELOPROLIF DISORD OR POORLY DIFF NEOPL DX AGE>=70 &/OR C.C	6.9	24	1.04570
414	OTHR MYELOPROLIF DISORD OR POORLY DIFF NEOPL DX AGE<70 W/O C.C.	5.4	22	.89840
415	O.R. PROCEDURE FOR INFECTIOUS & PARASITIC DISEASES	14.7	32	3.32920
416	SEPTECEMIA AGE >=18	8.3	25	1.61830
417	SEPTECEMIA AGE 0-17	5.4	22	1.15320
418	POSTOPERATIVE & POST-TRAUMATIC INFECTIONS	7.5	25	1.00260
419	FEVER OF UNKNOWN ORIGIN AGE >=70 AND/OR C.C.	6.1	23	.93060
420	FEVER OF UNKNOWN ORIGIN AGE 18-69 W/O C.C.	5.5	23	.83190
421	VIRAL ILLNESS AGE >=18	4.6	16	.56740
422	VIRAL ILLNESS & FEVER OF UNKNOWN ORIGIN AGE 0-17	3.6	18	.65820
423	OTHER INFECTIOUS & PARASITIC DISEASES DIAGNOSES	8.0	25	1.32070
424	O.R. PROCEDURES WITH PRINCIPAL DIAGNOSIS OF MENTAL ILLNESS	15.0	32	2.21120
425	ACUTE ADJUST REACT & DISTURBANCES OF PSYCHOSOCIAL DYSFUNCTION	4.8	22	.60970
426	DEPRESSIVE NEUROSES	7.8	25	.83300
427	NEUROSES EXCEPT DEPRESSIVE	6.4	23	.70190
428	DISORDERS OF PERSONALITY & IMPULSE CONTROL	7.4	24	.85130
429	ORGANIC DISTURBANCES & MENTAL RETARDATION	7.6	25	.84240
430	PSYCHOSES	10.5	28	1.07620
431	CHILDHOOD MENTAL DISORDERS	6.6	24	.84950
432	OTHER DIAGNOSES OF MENTAL DISORDERS	4.9	22	.69690

DRG DATA AS OF 10/1/85

DRG	D E S C R I P T I O N	GEO MEAN DAY	TRIM DAY	WEIGHT
433	SUBSTANCE USE & SUBST INDUCED ORGANIC MENTAL DISORDERS, LEFT AMA	2.9	16	.39060
434	SUBST ABUSE, INTOX INDUCE MNTL STN EXC DEPEND &/OR OTH SYMPT TRT	5.4	22	.70980
435	SUBSTANCE DEPENDENCE, DETOX &/OR OTH SYMPTOMATIC TREATMENT	6.7	24	.79800
436	SUBSTANCE DEPENDENCE WITH REHABILITATION THERAPY	9.8	27	1.01660
437	SUBSTANCE DEPENDENCE, COMBINED REHABILITATION & DETOX THERAPY	14.6	32	1.32760
439	SKIN GRAFTS FOR INJURIES	9.0	26	1.79300
440	WOUND DEBRIDEMENTS FOR INJURIES	9.3	26	2.03150
441	HAND PROCEDURES FOR INJURIES	2.7	16	.73050
442	OTHER O.R. PROCEDURES FOR INJURIES AGE >=70 AND/OR C.C.	6.1	23	1.81560
443	OTHER O.R. PROCEDURES FOR INJURIES AGE <70 W/O C.C.	5.6	23	1.48720
444	MULTIPLE TRAUMA AGE >=70 AND/OR C.C.	5.4	22	.70740
445	MULTIPLE TRAUMA AGE 18-69 W/O C.C.	4.1	21	.60150
446	MULTIPLE TRAUMA AGE 0-17	2.4	10	.47960
447	ALLERGIC REACTIONS AGE >=18	2.9	14	.44710
448	ALLERGIC REACTIONS AGE 0-17	2.9	9	.34700
449	POISONING & TOXIC EFFECTS OF DRUGS AGE >=70 &/OR C.C.	4.7	22	.69540
450	POISONING & TOXIC EFFECTS OF DRUGS AGE 18-69 W/O C.C.	3.3	18	.54220
451	POISONING & TOXIC EFFECTS OF DRUGS AGE 0-17	3.4	20	.54980
452	COMPLICATIONS OF TREATMENT AGE >=70 AND/OR C.C.	4.7	22	.80800
453	COMPLICATIONS OF TREATMENT AGE <70 W/O C.C.	4.3	21	.75050
454	OTHER INJURIES, POISONINGS & TOXIC EFF DIAG AGE >=70 AND/OR C.C.	4.6	22	.80980
455	OTHER INJURIES, POISONINGS & TOXIC EFF DIAG AGE <70 W/O C.C.	3.5	21	.60030
456	BURNS, TRANSFERRED TO ANOTHER ACUTE CARE FACILITY	5.5	23	1.81560
457	EXTENSIVE BURNS	8.8	26	7.56880
458	NON-EXTENSIVE BURNS WITH SKIN GRAFTS	18.9	36	3.94550
459	NON-EXTENSIVE BURNS WITH WOUND DEBRIDEMENT & OTHER O.R. PROC	13.5	31	3.26620
460	NON-EXTENSIVE BURNS W/O O.R. PROCEDURE	7.5	25	1.15950
461	O.R. PROC WITH DIAGNOSES OF OTHER CONTACT WITH HEALTH SERVICES	5.3	22	1.35720
462	REHABILITATION	18.0	35	2.14080
463	SIGNS & SYMPTOMS WITH C.C.	5.9	23	.79510
464	SIGNS & SYMPTOMS W/O C.C.	5.0	22	.69480
465	AFTERCARE WITH HISTORY OF MALIGNANCY AS SECONDARY DX	1.7	5	.28820
466	AFTERCARE W/O HISTORY OF MALIGNANCY AS SECONDARY DX	2.7	16	.41530
467	OTHER FACTORS INFLUENCING HEALTH STATUS	3.9	21	.72230
468	UNRELATED OR PROC	11.7	29	2.45420
469	PDX INVALID AS DISCHARGE DIAGNOSIS	.0	0	
470	UNGROUPABLE	.0	0	
471	BILATERAL OR MULT MAJOR JOINT PROCS OF THE LOWER EXTREMITIES	20.9	38	3.89940

APPENDIX B

Diagram of Appeals Processes for Coverage and Payment Disputes Under Part A and Part B

DIAGRAM FOR APPEALS PROCEDURES FOR COVERAGE AND PAYMENT DISPUTES UNDER PART A AND PART B OF THE MEDICARE PROGRAM

PART A

Coverage Determinations

ACTION	BENEFICIARIES	PROVIDERS
Initial Determination:	Fiscal Intermediary	Not applicable
Reconsideration:	Reconsideration for skilled nursing and home health benefits.	
	PRO Reconsideration for hospital benefits.	
Waiver of Liability:	Fiscal Intermediary Determination for skilled nursing and home health benefits.	Fiscal Intermediary Determination for skilled nursing and home health benefits.
	PRO determination for hospital benefits.	PRO determination for hospital benefits.
Administrative Review:	ALJ review for coverage and waiver of liability disputes of claims regarding skilled nursing and home health benefits of $100 or more.	ALJ review of waiver of liability decisions only of disputes regarding skilled nursing and home health benefits if beneficiary waives appeal rights.
	ALJ review for coverage and waiver of liability in disputes of claims regarding hospital benefits of $200 or more.	ALJ review of decision in waiver of liability that hospital knew or should have known that benefit not covered for claims of $200 or more.
Judicial Review:	Judicial review of coverage and waiver of liability disputes regarding skilled nursing and home health benefits of $2,000 or more.	Judicial review of coverage and waiver of liability dispute regarding skilled nursing and home health benefits of $2,000 or more.

PART A

Payment Determinations

ACTION	BENEFICIARIES	PROVIDERS
Initial Determination:	Fiscal Intermediary	Fiscal Intermediary
Reconsideration:	Fiscal Intermediary for skilled nursing home health and hospital benefits.	Fiscal Intermediary for skilled nursing home health and hospital benefits. PROs hear disputes over payments for outlier cases and errors in DRG coding. There is no administrative or judicial review of final PRO decisions on these issues.
Administrative Review:	ALJ review for payment disputes of claims regarding skilled nursing and home health benefits of $100 or more.	For claims of $1,000 to $10,000, appeal to fiscal intermediary only. For claims of payment issues of $10,000 or more, appeal to the PRRB.
Judicial Review:	Judicial review of payment disputes over $1,000 or more.	Judicial review of payment disputes decided by PRRB.

PART B

ACTION	BENEFICIARIES AND PROVIDERS*
Coverage Determination:	Carrier makes initial determination
Payment Determination:	Carrier makes initial payment determination
Reconsideration:	Carrier conducts reconsideration of coverage and payment determinations
Administrative Review:	At present there is no administrative review within HHS. Parties are entitled to a fair hearing conducted by the carrier if claims exceed $100.
Judicial Review:	There is no judicial review.
Waiver of Liability:	Carrier makes initial determination, reconsideration. Issue can be appealed to a fair hearing before carrier if $100 or more. There is no further administrative or judicial review.

*Only providers who accept assignment are entitled to exercise these appeal rights.

APPENDIX C

Miscellaneous Exhibits

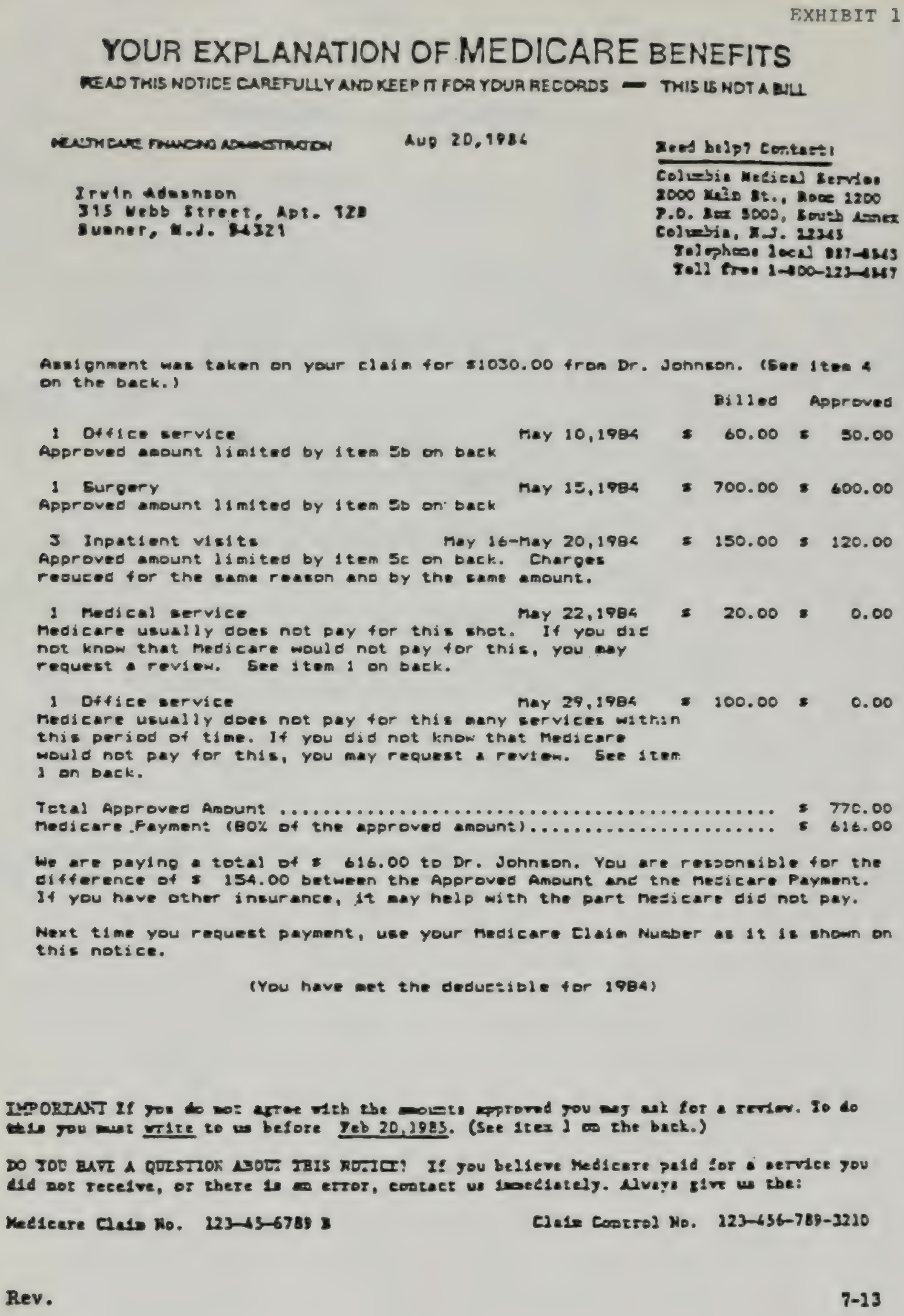

EXHIBIT 1

YOUR EXPLANATION OF MEDICARE BENEFITS

READ THIS NOTICE CAREFULLY AND KEEP IT FOR YOUR RECORDS — THIS IS NOT A BILL

HEALTH CARE FINANCING ADMINISTRATION

Aug 20,1984

Irvin Adamson
315 Webb Street, Apt. 12B
Sumner, N.J. 54321

Need help? Contact:

Columbia Medical Service
2000 Main St., Room 1200
P.O. Box 5000, South Annex
Columbia, N.J. 12345
Telephone local 987-6543
Toll free 1-800-123-4567

Assignment was taken on your claim for $1030.00 from Dr. Johnson. (See item 4 on the back.)

		Billed	Approved
1 Office service Approved amount limited by item 5b on back	May 10,1984	$ 60.00	$ 50.00
1 Surgery Approved amount limited by item 5b on back	May 15,1984	$ 700.00	$ 600.00
3 Inpatient visits Approved amount limited by item 5c on back. Charges reduced for the same reason and by the same amount.	May 16-May 20,1984	$ 150.00	$ 120.00
1 Medical service Medicare usually does not pay for this shot. If you did not know that Medicare would not pay for this, you may request a review. See item 1 on back.	May 22,1984	$ 20.00	$ 0.00
1 Office service Medicare usually does not pay for this many services within this period of time. If you did not know that Medicare would not pay for this, you may request a review. See item 1 on back.	May 29,1984	$ 100.00	$ 0.00

Total Approved Amount .... $ 770.00
Medicare Payment (80% of the approved amount)........................ $ 616.00

We are paying a total of $ 616.00 to Dr. Johnson. You are responsible for the difference of $ 154.00 between the Approved Amount and the Medicare Payment. If you have other insurance, it may help with the part Medicare did not pay.

Next time you request payment, use your Medicare Claim Number as it is shown on this notice.

(You have met the deductible for 1984)

IMPORTANT If you do not agree with the amounts approved you may ask for a review. To do this you must write to us before Feb 20,1985. (See item 1 on the back.)

DO YOU HAVE A QUESTION ABOUT THIS NOTICE? If you believe Medicare paid for a service you did not receive, or there is an error, contact us immediately. Always give us the:

Medicare Claim No. 123-45-6789 B   Claim Control No. 123-456-789-3210

Rev.   7-13

ALWAYS GIVE YOUR HEALTH INSURANCE CLAIM NUMBER AND CLAIM CONTROL NUMBER
WHEN WRITING ABOUT YOUR CLAIM. BRING THIS NOTICE WITH YOU IF YOU INQUIRE IN PERSON

1. IF YOU HAVE ANY QUESTIONS ABOUT THIS CLAIM
Call us if you have questions about this claim. Call us toll-free (_____) if you live outside the (city) local calling area. If you live in (city), our number is (_____). We will tell you in detail what facts we used to decide what to approve.

If you decide to have this claim reviewed, we will tell you how to do it. And we'll suggest other facts and proofs that you should send to us. We will also answer any other questions. See item 2 below for a statement about your appeal rights.

2. YOUR RIGHT TO A REVIEW OF THIS CLAIM
You may ask to have this claim reviewed. This would be done by people who did not make the first decision about how much to approve. You also have the right to ask someone else to act for you in helping you get this claim reviewed. We can also help you request a review—call us at the phone number in item 1 above. A request for review must be in writing. You must write for it within 6 months of the date of this notice. Our address is (   ).

3. FOR OTHER INFORMATION ABOUT MEDICARE
If you have other questions about Medicare, read "Your Medicare Handbook". You may also write or phone us. Our address is in item 2 above. See item 1 above for our phone numbers.

4. HOW MUCH MEDICARE PAYS
You must take care of the first part of your medical bills each year. This yearly share is called the DEDUCTIBLE. The amount of this year's deductible is printed on the other side of this notice. Each year, after you meet the deductible, we pay 80 percent of the Amount Approved for most of your remaining bills. (The Amounts Approved are shown on the other side.) Services that we pay at other rates are described below.

For treatment of mental illness as an outpatient Medicare pays 50 percent of the Amount Approved above your deductible amount. The bills for this care are added to your bills for other services to make up the deductible. The most we can pay for outpatient treatment of mental illness in a year is $250.

Medicare pays 80 percent of the Amount Approved for physical therapy services. However, there is a limit of $500 per year that we can pay for services by therapists who work for themselves.

Medicare can pay the full Amount Approved for some kinds of surgery in outpatient surgical centers. For some used medical equipment such as wheelchairs and hospital beds, the full Amount Approved is payable after the deductible has been met.

5. WHY THE AMOUNT APPROVED MAY BE LESS THAN THE AMOUNT BILLED
The Amount Approved is shown on the other side of this notice. It is the lowest of the three amounts described below:

a. The first is what you were charged for the service. (This is shown under "Billed", on the other side if this notice.)

b. The second is the midpoint of the charges your doctor or supplier of medical services made during the year prior to last July. This is the customary charge.

c. The third is based on the customary charges of doctors or suppliers in your area who furnish 75 percent of the services. This is the prevailing charge for this service in your area. This charge limit can increase each year only by a percentage determined by the Government to reflect overall changes in the economy. Medicare's approved amount does not necessarily reflect the current actual charges in your local area.

If you think the payment on this claim is wrong, please call us toll-free at the number in item 1 on this side of this notice.

ASSIGNMENT
Assignment is when your doctor or supplier of medical services agrees to accept the Amount Approved as the full amount he/she expects to be paid. With assignment, after the deductible has been met, we pay 80 percent and you pay 20 percent of the Amount Approved for most of your remaining bills.. The Medicare check is sent directly to your doctor.

6. HOW YOU CAN USE THIS NOTICE
You can use ths notice to show your doctor or supplier of medical services how much of your deductible you have met.

You can also send a copy of this notice to your private health insurance company if they need it to see how much Medicare paid. They will want to keep the copy you send to them. So you may want to make a copy to keep for yourself.

7. TIME LIMITS FOR FILING A REQUEST FOR MEDICARE PAYMENTS
To receive Medicare benefits you must send in a claim within the following time limits:

For Services Received	Send Claims By
10/1/81–9/30/82	12/31/83
10/1/82–9/30/83	12/31/84
10/1/83–9/30/84	12/31/85

These time limits may be extended if we, the Social Security Administration, or the Health Care Financing Administration made a mistake which caused you to delay sending in your claim. When this happens, you must send in your claim within 6 months after the month in which the mistake was corrected.

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EXHIBIT 2

Your Right to Appeal Decisions on Hospital Insurance Claims

July 1984

YOUR RIGHT TO APPEAL DECISIONS ON HOSPITAL INSURANCE CLAIMS

Whenever you receive services from a hospital, skilled nursing facility, or home health agency that takes part in Medicare, the institution will make the claim for Medicare payment. Medicare then pays the institution for covered services.

A Medicare intermediary determines whether the services you received are covered by Medicare hospital insurance. Medicare intermediaries are insurance companies or organizations under contract with Medicare to process and pay hospital insurance claims.

Many hospitals and skilled nursing facilities are serviced by peer review organizations. These organizations make Medicare payment decisions concerning medical necessity, quality of care, and whether services could have been provided in a less expensive type of facility.

If an intermediary or peer review organization decides that part or all of a claim cannot be paid because some or all of the services you received are not covered by hospital insurance, a notice is sent to you. The notice will show the services that are not covered and will give the reasons for denying payment.

If you disagree with the decision to deny payment, please call a Social Security office or the intermediary to ask someone for an explanation. Have your Medicare card handy so you can give the person your Medicare claim number. Tell the person about the services you received and why you think the decision on your claim is incorrect. He or she will explain the provisions of the Medicare law on which the decision was based.

If you still disagree with the decision after you have received an explanation, you can appeal the decision. This leaflet describes the four appeal steps you may take. These steps apply only to hospital insurance claims. Different rules apply to Medicare medical insurance claims. You can get a copy of the leaflet, *Your right to appeal your medical insurance payment,* by calling any Social Security office.

Step 1: Reconsideration

If you are notified that *all* of your claim is denied, you have 60 days from the date you receive the denial notice to ask for a reconsideration of the decision.

If only *part* of your claim is denied, you will receive an initial notice explaining what services could not be covered. Later, you will receive a second notice showing the benefits that were paid as well as the services that were denied. If you wish, you can ask for reconsideration after you receive the first notice. But your request for reconsideration *must* be submitted no later than 60 days from the date you receive the second notice.

A request for reconsideration must be made in writing. You can get a form to make your request from any Social Security office or your Medicare intermediary. The people there will be glad to help you prepare your request. Or, you may write directly to the intermediary or peer review organization.

Your reconsideration request should show:

- Your name and health insurance claim number (shown on your Medicare card),
- Where and when you received the services,
- The name of the intermediary or peer review organization that made the initial decision, and
- The reasons you are not satisfied with the decision.

You also should include any additional evidence you want to submit — for example, a statement from your doctor.

Medicare claims reviewers who did not take part in the original decision on your claim will make the reconsideration. You will get a completely independent decision. The reviewers examine all pertinent medical evidence, including any additional evidence you submit, and then make a new decision on your claim.

You will be sent a notice of the reconsideration decision.

A special rule—Under a special rule, if a hospital insurance claim is denied because the services were not medically necessary or were custodial care, payment can still be made if you had no way of knowing the services were not covered. Both the decision that services were not covered and the decision as to whether you knew the services were not covered can be reconsidered. If this special rule applies to your case, the denial notice you receive will include instructions on the reconsideration procedure.

Step 2: A hearing

If you do not agree with the reconsideration decision *and if* the amount in question is $100 or more, you may request a hearing. You must request the hearing within 60 days from the date you receive the notice of the reconsideration decision.

Your request for a hearing must be in writing. Special forms are available at any Social Security office or your Medicare intermediary. The people there will be glad to help you submit your request. If you have any new evidence, you should submit it with your hearing request.

The hearing is an informal proceeding conducted by the Office of Hearings and Appeals of the Social Security Administration. It is usually held in a place near where you live. You will be notified when and where the hearing will be held at least 10 days in advance. If you wish, you may have someone represent you at the hearing and have witnesses testify on your behalf.

The administrative law judge who conducts the hearing has not taken any part in the earlier decisions made on your claim. The judge will review what has already happened in your case, tell exactly what must be decided, and ask questions of you and any representative and witnesses you may have. You or your representative may present additional evidence to the administrative law judge. All testimony presented at the hearing is taken under oath.

You do not have to attend the hearing unless you wish to personally explain the facts in your case. If you do not attend, the judge's decision will be based on the information already in the file and any other evidence or statements you have submitted.

The administrative law judge will send you a full explanation of his or her decision after the hearing.

Step 3: Review by Appeals Council

If you disagree with the decision made by the administrative law judge, you may request a review by the Appeals Council of the Office of Hearings and Appeals. You must file a written request for review within 60 days from the date you receive the notice of the administrative law judge's decision. Special forms for requesting a review are available from any Social Security office or Medicare intermediary.

It is up to the council to decide whether it will review your case. If the council decides to review it, you may submit additional evidence for the council's consideration, or you or your representative may appear in person and present new evidence.

The Appeals Council will notify you of its decision in writing.

Step 4: Court action

If you are still not satisfied with the decision on your claim after taking the preceding steps, you may bring suit in a Federal district court *if* the amount in question is $1,000 or more.

You may file suit whether or not the Appeals Council reviews your case. If the council does not review your case, you must file suit within 60 days of the date you receive the notice telling you the council would not review your claim. If the council does review your case, you must file suit within 60 days of the date you receive the notice of the Appeals Council's decision on your claim.

THE IMPORTANCE OF TIME LIMITS

It is important that you carefully observe the time limit for requesting each appeal step. A time limit can be extended only if you can show that you had good cause for not meeting the deadline. The official notices you receive after each step will always show the time period you have for requesting further review.

YOUR RIGHT TO BE REPRESENTED

You may choose to have someone represent you when you deal with the Social Security Administration. The representative may be an attorney, relative, or friend. If you choose to have someone represent you, both you and your representative will get a notice of the decision made at each step in the appeals process.

FOR MORE INFORMATION

If you have any questions about your rights to appeal a decision made on your hospital insurance claim, call any Social Security office or your Medicare intermediary. The people there will be glad to help you.

DEPARTMENT OF HEALTH AND HUMAN SERVICES
Health Care Financing Administration

Publication No. HCFA 10085
July 1984

☆ U.S. GOVERNMENT PRINTING OFFICE 1984: 421-173/4505

EXHIBIT 3

DEPARTMENT OF HEALTH & HUMAN SERVICES Health Care Financing Administration

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AN IMPORTANT MESSAGE FROM MEDICARE

YOUR RIGHTS WHILE A MEDICARE HOSPITAL PATIENT

- You have a right to receive all of the hospital care that is necessary for the proper diagnosis and treatment of your illness or injury. Your discharge date should be determined solely by your medical needs, not by "DRGs" or by Medicare payments.
- You have the right to be fully informed about decisions affecting your Medicare coverage or payment for your hospital stay.
- You have a right to appeal any written notices you receive from the hospital or Medicare stating that Medicare will no longer pay for your care.

TALK TO YOUR DOCTOR

You and your doctor know more about your condition and your health care needs than anyone else. If you have questions about your medical treatment, your need for continued hospital care, or your discharge date, consult your doctor. These decisions should be made between you and your doctor. If you have questions or concerns about hospital services, you should talk to the hospital's patient representative or discharge planner. Don't hesitate to ask questions—you and your family should ask about your care, your stay in the hospital, and your planned discharge.

PEER REVIEW ORGANIZATIONS

Peer Review Organizations (PROs) are groups of doctors who are paid by the Federal Government to review medical necessity, appropriateness and quality of hospital treatment furnished to Medicare patients. Peer Review Organizations will respond to your request for review and appeal of written notices stating that Medicare will no longer pay for your hospital stay.

IF YOU THINK YOU ARE BEING ASKED TO LEAVE THE HOSPITAL TOO SOON

- Ask a hospital representative for a written notice of explanation immediately, if you have not already received one. The hospital's written notice is necessary if you decide to appeal to the PRO. The written notice must describe how you appeal.
- If you decide to appeal, do so immediately—either call or write the PRO. If you lose the appeal, you may be billed for all costs of stay beginning with the 3rd day after you receive the written notice. The appeals process can take up to three working days from the time your appeal request is received. Thus, if you appeal and lose, you may have to pay for at least one day of hospital cost.
- REMEMBER: WITHOUT A WRITTEN NOTICE, YOU HAVE NO RIGHT TO APPEAL.

The Peer Review Organization for this area is:

Rev. TELEPHONE: ( )

EXHIBIT 4

PROVIDER REIMBURSEMENT REVIEW BOARD

Performance Statistics For The Periods Ending 6-30-75 Through 6-30-86

Fiscal Period Ending	Requests for Hearings		CASES RESOLVED						Case Inventory
			Prior to Hearing*		Expedited Judicial Review*	Decisions Published	Total Resolutions		
	Number	%Increase	Number	% of requests			Number	%Increase	
6-30-75	107	-	23	21	N/A	3	26	-	N/A
6-30-76	252	136	81	32	N/A	52	133	412	N/A
9-30-76 (3 mo.)	64	N/A	40	63	N/A	25	65	N/A	N/A
9-30-77	285	13	108	38	N/A	93	201	51	N/A
9-30-78	356	25	155	44	N/A	103	258	28	N/A
9-30-79	379	6	136	36	N/A	77	213	(17)	N/A
9-30-80	454	20	177	39	N/A	127	304	43	697
9-30-81	598	32	247	41	N/A	121	368	21	927
9-30-82	1,074	80	299	28	5	157	456	24	1,545
9-30-83	1,110	3	580	52	39	166	746	64	1,909
9-30-84	1,034	(7)	616	60	12	181	797	7	2,146
9-30-85	1,449	40	883	61	72	116	999	25	2,596
10-1-85 to 6-30-86 (9 months)	1,345	N/A	673	50	81	96	769	N/A	3,172
TOTALS	8,507	N/A	4,018	47	209	1,317	5,335	N/A	N/A

*Note 1: PRRB started to process EJR actions in 1982. EJR count included in cases resolved "prior to hearing."

BACKGROUND REPORT FOR RECOMMENDATION 86-6

PETITIONS FOR RULEMAKING: FEDERAL AGENCY PRACTICE AND RECOMMENDATIONS FOR IMPROVEMENT

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School of Law

Report to the Administrative Conference of the United States

December 1986

PETITIONS FOR RULEMAKING: FEDERAL AGENCY PRACTICE AND RECOMMENDATIONS FOR IMPROVEMENT

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Introduction

While in this era of Gramm-Rudman[1] federal agencies are confronted with tight budgets, there is no similar scarcity of proposals for regulatory change emanating from a variety of sources, including Congress, the President, and various sectors of the public. The methods for communicating ideas are similarly multifarious. Some are more formal than others. One of those which has not previously been studied to any substantial extent is petitions for rulemaking. In fact it is probably the only significant aspect of the rulemaking process that has escaped close scrutiny during the reign of the "hard-look" doctrine.[2]

Since the enactment in 1946 of the Administrative Procedure Act,[3] federal agencies have been directed to give interested persons "the right to petition for the issuance, amendment, or repeal of a rule."[4] Congress was not, however, content to rely solely on that provision and subsequently enacted other statutes affording the right to petition for rulemaking, which provisions in various particulars differ from the APA.[5] In addition, many, though not all, agencies have elaborated on the sparse outlines of the petition processes thus established by means of rules, statements, internal directives to staff and other written documents.[6] Not surprisingly, while there are similarities among agencies with regard to how they deal with petitions for rulemaking, the differences, even within a particular agency, can be substantial. Those differences have numerous sources including the nature of the substantive and procedural statutory mandate confronting an agency, the nature of its "clientele," and its regulatory "style."

Along with Congressional and agency elaboration of the petition process, much of which has occurred since the mid-1970's, the federal courts have become increasingly active in reviewing agency responses to petitions for rulemaking, in particular denials and inaction.[7] The Supreme Court's recent decision in Heckler v. Chaney[8] might, however, foreshadow future retreat from judicial scrutiny in this area,[9] though it seems not to have occurred to date.[10] Assuming their authority is largely unimpaired, these lower court decisions have some important ramifications regarding how agencies should structure their processes for receiving, considering and disposing of petitions for rulemaking.

In conducting this study, sources other than statutes, regulations and court opinions were deemed to be of primary importance, however. The focus was rather on obtaining the views of both agency officials and experienced petitioners in order to find out exactly how the various petition processes function, what benefits, if any, accrue to the agencies and the public from those processes, what problems consistently recur, and how these problems might be resolved in order to improve those processes and increase their value both for the agency and the public.

Accordingly, a questionnaire seeking certain general information was sent to over fifty agencies.[11] Based on their responses and other factors, seven agencies[12] were chosen for more in-depth study through interviews of officials and examining docket room practice and petition files. Practitioners having some experience with each of these agencies were also requested to provide information and views.

The results of the study suggest Congressional reconsideration of the need for special petition statutes and adoption by all agencies of a set of petition procedures which are described more fully at the conclusion of this report.[13] While agencies should have discretion to elaborate more fully on their petition practice, the process should generally include a description of the format required for a petition, establishment of a public docket for each petition, public solicitation of views prior to denial or formal commencement of a rulemaking proceeding, and formal notice to the petitioner, and sometimes to the public, of the disposition.[14] Most of the agencies studied in detail currently have written procedures in place which exceed in varying degrees the minimum recommended. While the research did not discover numerous instances where an agency's failure to adopt formal procedures for the receipt, consideration and disposition of rulemaking petitions had created documented problems for the petitioner or the agency,[15] the experience of agencies which have handled petitions, various statutory provisions and the dictates of sound administrative practice support agency adoption of at least the minimum procedures described at the conclusion of this report.

In order to put the study and its results in focus, it should be noted at the outset that there was no attempt to examine in any depth agency practices with regard to requests for "waivers,"[16] "exemptions,"[17] "variances"[18] or other types of administrative action that generally impact on one person or legal entity. Such relief can, however, apply to an entire class and, therefore, bears certain important similarities to a "rule" as defined by the Administrative Procedure Act.[19] Nor were some very specialized rulemakings commenced at the request of persons outside the agency such as ratemaking,[20] establishment of marketing quotas,[21] and export controls[22] surveyed to any great degree, though here again rulemaking in the sense used in the APA is involved. To some extent these self-imposed limitations on the study were artificial and based on time and resource considerations. Nevertheless, it is likely that many of the findings, conclusions and recommendations apply equally well to at least some of these more specialized matters.

Certain fundamental characteristics of the petition processes as established by the APA and other statutes should be noted at the outset since they help structure the following discussion and its conclusions.

The language and history of the statutory petition provisions suggest that agencies should assign some significant priority to the handling of petitions for rulemaking.[23] Petitions must be given serious and expeditious consideration. However, as employed in this report, the term "priority" is not intended to suggest that agencies must necessarily put the handling of rule-making petitions ahead of any other type of matter on which the agency may or must expend its resources, with the exception of response to suggestions for rulemaking changes made by the public through means other than those sanctioned by statute. Rather, "priority" is given by treating the consideration and disposition of petitions as one of the agency's important responsibilities, one which makes a legitimate claim to its time and resources and should not be given short shrift in allocating these.

Moreover, the statutes, and in particular the APA, demand that petitions for rulemaking not be treated entirely on an ad hoc basis but rather pursuant to written procedures adopted by the agencies. An agency should by either rule, staff directive or other formal statement lay down at least the basic outlines of the petition process. This type of formality has a number of benefits for both the petitioner and the agency. But one of the most important is to help assure that some priority is given to the treatment of petitions.[24] The formality of the process achieves this in a variety of ways, some subtle though not necessarily ineffective on that account.

Finally, while a petition may launch an agency proceeding that involves the participation of many persons and legal entities, the agency has the obligation to directly inform the petitioner of an unfavorable disposition of his or her petition and the reasons for this action.[25] To the extent that there is a perception that the bureaucracy deals with the public in an impersonal manner, this obligation has significant symbolic value today.

II.

The Right to Petition: Constitutional and Statutory Sources

A. The Constitution

In English-speaking countries the right to petition can be traced back to the Magna Carta in 1215.[26] In 1669 the House of Commons resolved that every commoner in England possessed the right to prepare and present petitions to it in the case of alleged grievances.[27] The Bill of Rights of 1689 declared that "it is the Right of the Subjects to petition the King."[28] Assertion of the right in the colonies in North America appeared in the Stamp Act Congress of 1765 when its Declaration included the right to petition the King and Parliament.[29]

The First Amendment to the United States Constitution, ratified in 1791, enjoins Congress from making any law "abridging . . . the right of the people . . . to petition the Government for a redress of grievances."[30] The right of petition thus recognized first came into prominance in the early 1830's when petitions against slavery in the District of Columbia flooded Congress. In response to this development the House of Representatives in 1840 adopted a standing rule that no such petition could be received or entertained by the House. However, the efforts of the former President John Quincy Adams resulted in the repeal of this rule in 1844.[31] His attack on the rule was based in part on constitutional grounds.[32]

As it has been interpreted by the courts, the right to petition has not been confined to demands for a redress of grievances in any technical sense but encompasses demands for the exercise of government powers to further the interest of the petitioners and their views on politically contentious issues.[33] Moreover the Supreme Court has held that the right extends to all departments of the government, including administrative agencies.[34]

Given all this, it might be argued that Section 553(e) of the Administrative Procedure Act[35] is superfluous on the ground that it merely directs agencies to afford "interested persons" the "right to petition" with regard to the issuance, amendment and repeal of a rule when the Constitution itself forbids both Congress and impliedly federal administrative agencies from preventing the petitioning of citizens. In fact it might be argued that the constitutional protection is broader than the opportunity to petition afforded by the APA since by its terms Section 553(e) is limited to petitions by "interested persons."[36]

More importantly, if 553(e) were interpreted as not adding anything to existing constitutional protection, the criticism leveled by some commentators at Section 553 as currently drafted would be beside the point.[37] On their reading of Section 553(a),[38] the statutory right to petition does not apply to rules involving "a military or foreign affairs function of the United States"[39] or to "a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts."[40] The express language and arrangement of Section 553(a) seems to support this interpretation.[41] But even if that interpretation of the APA were correct,[42] Congress in 1946 could hardly achieve such a result to the extent that 553(e) provides nothing more than the First Amendment, a position not without support in the legislative history of the APA.[43]

This makes it crucial to ascertain the exact scope of the constitutional right to petition as well as the intended scope of Section 553(e). As to the former, the Supreme Court held in Smith v. Arkansas State Highway Employees[44] and most recently reiterated in Minnesota Board for Community Colleges v. Knight[45] that the first amendment rights of speech, association and petition do not require government policymakers to listen or respond to the communications by individuals on public issues.[46] In short the constitutional right to petition is no more than the right to "make a clamor."[47]

That the drafters of the APA saw the need to include a provision such as Section 553(e) suggests that they intended to provide an opportunity going beyond that which was constitutionally protected, though they may have considered the First Amendment for their inspiration.[48] In this connection it should also be noted that while the First Amendment assumes that a "right to petition" exists independently of its strictures and merely commands that Congress not abridge it,[49] Section 553(e) directs agencies to "give an interested person" the right to petition, a choice of language and syntax which suggests that the operative effect of the provision is not merely to confirm and protect but to create. Furthermore, even if the ADA drafters intended that the statutory provision merely reiterate what they understood to be the existing constitutional right,[50] the legislative history of Section 553(e) clearly establishes a scope for the statutory right to petition that goes far beyond what the First Amendment, as currently interpreted, encompasses.

B. The Administrative Procedure Act: Sections 553(e) and 555

As noted above,[51] the constitutional right to petition is not "action-forcing" with respect to administrative agencies for its strictures do not compel them to receive, consider or act upon petitions submitted by anyone. However both the Senate and House Reports on the bill that ultimately was enacted in 1946 as the Administrative Procedure Act emphasize that agencies have the obligation under Section 553(e) to receive and consider petitions filed pursuant to that provision.[52] Moreover, in accordance with Section 555(b) the agency must "[w]ith due regard for the convenience and necessity of the parties . . . and within a reasonable time, . . . proceed to conclude a matter presented to it."[53] Where it denies a petition, the agency must, according to Section 555(e), give "prompt notice" and, "[e]xcept in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for the denial."[54] The legislative history indicates that the notice of denial must be calculated to inform the petitioner personally of the action taken and the reasons therefor.[55]

Section 555(e) by itself does not expressly or impliedly require that an agency consider the contentions raised in a petition. Unless or until an agency determines to deny a petition, its obligations are not triggered. The obligation to consider the petition arises from Section 553(e)[56] and the requirement that it dispose of it in some fashion seems to come from Section 555(b) which requires an agency to "proceed to conclude" matters presented to it within a reasonable time.[57] Therefore it simply is not true that "[t]he chief practical significance of this express right to petition requirement" is "that the denial of a section 553(e) petition is governed by the provisions of section 555(e)."[58]

The APA specifically refers to only one type of possible disposition of a petition: Section 555(e) expressly refers to denial of petitions.[59] Since the language of Section 553(e) refers to the right to petition "for the issuance, amendment, or repeal of a rule," it can be argued that a final affirmative disposition of a petition, that is, a "grant," occurs only with the final promulgation of a rule which corresponds to some degree to the petitioner's request (though that action may also constitute a denial to the extent the petitioner does not get everything it initially called for).

There are several pre-promulgation steps an agency can take in response to a rulemaking petition including: internal investigation of the merits of the petition, publication in the Federal Register of the petition or a summary of it requesting comments from interested persons, publishing an advance notice of proposed rulemaking soliciting comments, holding a hearing or conference on the proposal, and issuing a notice of proposed rule-making. Each of these is an intermediate stage in the consideration of a proposal, the terms of which may undergo significant change throughout the process of consideration. Logically there is no basis for considering one rather than another of these as a final affirmative disposition of a petition. In fact, if anything other than the issuance of a final rule were considered a "grant" of the petition, there is no reason why an agency could not reply to a petition by thanking the petitioner for an idea that has merit and is worthy of consideration but treat that as the end of the matter. As long as that type of response was issued in a timely fashion, it would arguably have discharged its duty under Section 555(b) to "proceed to conclude" the matter presented to it with reasonable promptitude.[60] Under this reading, the APA provisions applicable to petitions would assure nothing other than some consideration followed by an encouraging response. Since a denial could invite judicial review and reversal,[61] it would be much easier for an agency to issue this type of disposition and then forget about the matter. Certainly if it could legitimately do this, the APA petition procedures do amount to little more than a requirement that the agency answer its mail.[62]

On the other hand, if a "grant" of the petition occurs only when a final rule is issued, the agency can fulfull its Section 555(b) obligation only by a denial (in whole or part) or by issuance of an adopted rule. In this circumstance a denial may be judicially reversed if not well-considered[63] and a grant will not be lightly made. Moreover, unless a denial is forthcoming, the agency is under the obligation to complete the entire rulemaking, not just answer its mail, with reasonable promptitude.[64] A denial would occur when the agency first formally indicates its unwillingness to adopt, in whole or part, the suggestions of the petitioner,[65] though a "final" denial subject to judicial review may not be deemed to occur until the immediate possibilities of agency change of heart appear unlikely.[66]

The APA petition process requires little of the agency in terms of the consideration given to petitions if a polite "thank you" is an acceptable final disposition. Only if the grant of an APA petition is deemed to occur at the time of final issuance, amendment or repeal of a rule can it be realistically said that the APA requires serious consideration of rulemaking petitions and that their disposition has been statutorily designated as an important aspect of an agency's workload.

There is nothing in the text or legislative history of the APA that unequivocally indicates which construction represents the intent of Congress in 1946. However the latter interpretation is more consistent with these materials.[67] If adoption of this construction would create substantial problems for agencies by, for example, consuming large portions of their scarce money and manpower, this might be enough to argue against its adoption where the evidence is as relatively inconclusive as it is on this issue. But such results are not likely to be forthcoming. This interpretation does not require that an agency grant petitions, only that it seriously and with reasonable promptitude decide whether or not to issue the proposed rule and, if it decides in the affirmative, to proceed with reasonable dispatch, consistent with other agency business, to issue a rule which may reflect petitioner's suggestions to some degree and differ from them as to others (a grant in part and denial in part). Accordingly, it is suggested that this first interpretation is the preferred one.[68] As noted below, agencies currently differ in their approaches to this issue.[69]

Both the House proceedings on the APA[70] and the Attorney General's Manual[71] indicate that it was expected that agencies would expressly adopt procedures to govern the receipt, consideration and disposition of petitions.[72] As an example of the type of procedural framework contemplated, the Manual indicates that rules might "call, for example, for a statement of the rule making action which the petitioner seeks, together with any data available in support of his petition, a declaration of the petitioner's interest in the proposed action, and compliance with reasonable formal requirements."[73] As will be seen later, many agency regulations implementing Section 553(e) seem to have been modelled on this suggested outline of a procedural framework for considering petitions.[74]

Despite the absence in the APA of language mandating that agencies formally adopt and publish anything regarding the petition process, the Freedom of Information Act[75] appears to fill the gap in this regard, at least to some extent. Section 552(a)(1) provides in relevant part that:

> Each agency shall separately state and currently publish in the Federal Register for the guidance of the public-
>
> (A) descriptions of . . . the established places at which, the employees . . . from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;
>
> (B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;
>
> (C) rules of procedure . . . and instructions as to the scope and contents of all papers, reports, or examinations . . . .[76]

At a minimum this suggests that the agency must publicly indicate the place or places where petitions may or must be filed,[77] mention petitions for rule-making as one "method" of making a request,[78] describe generally the manner in which the agency decides to grant or deny a petition[79] and provide some guidance regarding the content of a petition.[80]

While the right to petition is reserved to "interested" persons[81] and the Attorney General suggested that it would "be proper for an agency to limit this right to persons whose interests are or will be affected by the issuance, amendment, or repeal of a rule,"[82] it is doubtful that Congress contemplated the requirement of "interest" as a substantial restriction. Neither the Senate nor the House Reports in 1946 purported to explain the meaning of this term as it is used in Section 553(e).[83] It is employed without illuminating explanation in other parts of the APA, including Section 553(c)'s provision for opportunity to comment in informal rulemaking,[84] 555(b)'s direction that the agency permit persons to appear before it for the presentation of requests,[85] and 555(e)'s obligation to give prompt notice and explanation of denial of petitions.[86] An "interested person" is presumably not necessarily the same as one "adversely affected or aggrieved" as that phrase is used in Section 702[87] which defines standing to obtain judicial review of agency action. To the extent the APA petition process is action-forcing it might make some sense from the point of view of conserving agency resources to read the requirement of an "interest" as referring to more than an "abstract," "academic" interest. But to the extent that good ideas for regulation or deregulation that should in fact be seriously considered are not necessarily the monopoly of regulated or beneficiary groups, such a reading has little to recommend it and, as we shall see, is not the one generally adopted by agencies.[88] At the same time, however, requiring a petitioner to describe the nature of its interest in the subject matter of a petition may provide the agency with information helpful in deciding what action to take with regard to the petition. For example, in some instances a petition from an individual whose "interest" stems from years of prominent research and teaching in an area may justifiably be taken somewhat more seriously than one from someone entirely without prior demonstrated "interest" in the subject matter of its proposal.[88a]

Since the APA gives "petitions" some type of special status in forcing their receipt, consideration and final disposition that does not attach to "requests" that might otherwise be presented to an agency, it is crucial for the agency to determine whether a particular communication from an outsider is in fact entitled as a matter of law to this special treatment. In the course of a week's work, agency personnel may be bombarded in a variety of ways with requests for action. A citizen "complaint" may be relayed over the telephone to the secretary of a regional administrator and express indignant disapproval of a recent announcement of agency policy. Or a two hundred page, type-written document, prepared by a lawyer, entitled "petition," addressed to the Secretary of the Department of Agriculture, and expressly invoking Section 553(e) may be hand-delivered to the agency's offices in Washington. Literally any communication, oral or written, from an outsider to agency employees, asking directly or indirectly, in a formal or informal manner, for regulatory change, could be considered a "petition" within the meaning of Section 553(e). Each agency would appear, however, to possess some discretion to require that a communication bear certain characteristics before it triggers the obligations that follow presentment of a petition. Reasonable (that is, not overly burdensome) procedural rules or other written guidelines can presumably draw the line between what will be treated as a "petition"[89] and what will be handled as "correspondence" or a "complaint." If the latter, the agency has no unqualified[90] legal obligation under the APA to accept or consider it. Such rules or other written instructions defensibly help the agency conserve its scarce decision-making resources for those persons who are willing to comply.

If a request does not meet such threshold requirements, an agency can refuse to accept it for filing as a petition or refuse to consider it on the merits.[91] In those circumstances its procedural decision is arguably subject to the requirements of Section 555(b) that it "proceed to conclude" matters "presented" to it within a reasonable time.[92] This means that the rejection of an attempted filing for procedural defects should occur with promptitude following presentment. Even if the agency can permissibly find that the submission does not qualify as a petition and refuse to receive it, Section 555(b) imposes the obligation on it to make a decision one way or another on this matter and it implicitly would seem to require it to consider the petition for these limited purposes, though the obligation to consider the merits of a petition arguably finds its source in Section 553(e).[93] If its determination of noncompliance and consequent rejection of a filing or refusal to consider a petition is considered a "denial" within the meaning of Section 555(e), the agency is also subject to the requirements of prompt notice and explanation.[94] Of course if an agency adopts rules to govern its handling of petitions, where judicial review is available, the courts will expect the agencies to comply with them, or at least explain instances of noncompliance.[95]

Section 553(b) exempts from the APA's notice and opportunity to comment procedures an agency's adoption of interpretative rules, general statements of policy, rules of agency organization, and agency rules of practice and procedure.[96] However, all of these are subject to the right to petition and the obligations found in Section 555 that attach upon filing of a petition or its denial.[97] In fact since the agency's initial adoption of these rules may (though need not be) without public input, the right to petition allows interested persons following adoption to afford the agency the benefit of their views and information which may suggest the need for reconsideration.[98] A denial of the petition for amendment or repeal may invite judicial correction where the explanation for the agency's refusal to change its mind is not satisfactory.

In sum, agency handling of petitions for rulemaking submitted under the authority of the APA has (or should have) three salient characteristics:

a. Sections 553(e), 555(b) and 555(e) together create a method of citizen contribution to the regulatory process that is action-forcing. If considered a petition within the meaning of the APA and reasonable implementing guidelines, a request for rule-making action must be received, considered, and disposed of on the merits with reasonable promptitude. Accordingly, regardless of what is considered a "grant" of a Section 553(e) petition, the APA insures that agencies give some priority in ordering their workloads to the disposition of petitions for rulemaking over informal response to suggestions from the public for rulemaking changes. Moreover, to the extent that a "grant" of a petition is not deemed to occur until the final rule conforming to the petition is issued, the APA ensures that more than cursory treatment is accorded to petitions for rulemaking. Therefore, the priority assigned to the handling of petitions becomes somewhat more significant as a general matter in terms of the allocation of agency resources. To the extent that an agency's failure to receive, consider or act on a petition in a timely fashion or its denial of the petition do not fall with the exceptions to judicial review found in Section 701(a)(1) or (2) of the APA,[99] the courts can to some degree enforce the procedural obligations imposed on the agency as well as assure a minimum degree of reasoned decision-making in the denial of petitions.[100]

b. While section 553(e) is silent on the matter, the legislative history of that provision as well as the Freedom of Information Act require that the petition process be described in writing to some degree. The content of petition rules or guidelines may vary from agency to agency, however. The factors that should enter into their design will be discussed later.[101] Their very existence can both expedite the handling of petitions[102] as well as indicate to the public and agency employees that the agency considers the petition process important. In these ways, as well as others, a written description (or prescription of the petition process) can ensure that petitions are given the priority contemplated by Congress in 1946. By the same token, however, excessive formality in the petition process can interfere with expeditious handling of petitions.

c. While a petition may trigger agency consideration that goes far beyond the materials submitted by the petitioner and ultimately result in a proceeding involving many sectors of the public, an obligation rests on the agency, if it ultimately determines not to take any action or not to take the type of action initially requested, to personally notify the person who initiated the process.[103]

C. Section 553(a): Purported Exceptions to the APA Petition Process

As noted above, it has generally been assumed that the Section 553(e) right to petition is subject to the exceptions for various matters and functions found in Section 553(a), a construction suggested by the express language and structure of Section 553.[104] However, in discussing Section 553(a), the House Report noted:

> The exception of proprietary matters is included because a main consideration in such cases relates to mechanics, interpretations, or policy and it is wise to encourage and facilitate the issuance of rules by dispensing with all mandatory procedural requirements. Changes can then be sought through the petition procedures of section 4(d), by which

> such rule making may also be initially invoked.[105]

In referring to "these exemptions" immediately after making this statement,[106] the comments with regard to petitions are arguably not limited only to petitions with regard to proprietary matters. No similar statement suggesting that the right to petition applies to both exempt and non-exempt matters and functions, occurs in the Senate Report[107] and it was in the Senate that the bill originated, only to be amended by the House in minor detail not relevant for present purposes.[108] If the originating chamber intended one result to be achieved by specific language and structure and the other intended a different result but retained the original language and structure, a difficult problem would be presented. In this circumstance a good argument could be made that if the second chamber differed in the meaning it attributed to the language used by the originating chamber it had the obligation to expressly amend the bill for its meaning to prevail.[109]

However, in looking closely at the the language of both the Senate and House reports, the focus of the discussion regarding the exemptions is on the need to avoid the alleged burdens of "public rulemaking" in the case of the exempt functions and matters.[110] Both note that "[t]hese exemptions . . . merely confer a discretion upon agencies to decide what, if any, public rule-making procedures shall be utilized in a given situation within their terms."[111] Moreover, to the extent the APA petition provision was motivated by Congress's interpretation of the mandates of the First Amendment,[112] it is difficult to argue that Section 553(a) was intended to be applicable to the right to petition found in Section 553(e).

In his earlier study of the section 553(a) exceptions, Professor Bonfield assumed that they applied to Section 553(e).[113] His ultimate conclusion was that "an exemption from the right to petition conferred by section 553(e) seems no more necessary or justifiable for subsection (a) . . . rule-making than for rule-making already covered by section 553."[114] This itself casts some doubt on the correctness of his initial premise regarding Congress's intent regarding the scope of 553(a).[115] In fact poor draftsmanship, not conscious legislative design, is likely responsible for the structure of Section 553 on which his initial premise was presumably founded.[116]

Since the Supreme Court has yet to adopt the standard interpretation that Section 553(a) applies to the right to petition, there is nothing to prevent the agencies or the courts from reexamining this matter and adopting the construction suggested above. As Professor Bonfield has argued, the right to petition is important from the point of view of allowing affected parties to protect their interests and forcing agencies to open their doors to new ideas and information not otherwise available to them.[117] While the APA right of petition imposes some costs on an agency given its action-forcing characteristic,[118] those would seem to be relatively modest. There is no empirical data now available indicating the burdens that might be imposed on agencies which up until now may have considered themselves exempt from petitions with regard to the exempted areas. However, even under the traditional interpretation of Section 553(a), some agencies currently authorize in a limited fashion the filing of petitions for rulemaking with regard to exempted functions and matters.[119]

Regardless of whether or not 553(a) is reinterpreted in the manner suggested above, Congress should amend Section 553 to make clear that the right to petition applies even to exempt matters and functions.[120] It will thereby either finally set matters straight after years of confusion, assuming the revisionist interpretation suggested above is correct, or, if that interpretation is in fact incorrect, eliminate an unnecessary restriction on the public's ability to contribute in some degree to the fashioning of agency regulatory policy.

D. Statutory Regulation of the Petition Process Outside the APA

1. Special Petition Statutes

Over the years, but in particular since 1970, Congress has enacted a variety of statutory provisions giving the right to petition for the issuance, amendment and repeal of specific types of rules. It has chosen not to rely solely on the APA petition process, in part, because in many of these instances it has perceived needs for strict time deadlines for agency action, for procedures in addition to those expressly mandated in the APA, and for laying down specific substantive criteria to direct the grant or denial of petitions. Legislative desires to promote, or at least facilitate, citizen participation in the administration of programs for public health and safety, which is evidenced elsewhere in the legislation of the 1970's,[121] found expression in many of these special petition provisions. They sometimes require, for example, public notice of receipt of petitions for the purpose of solicitation of views by interested persons with regard to the merits of rulemaking petitions. In several cases judicial review of petition denials and failures to act on petitions are made expressly subject to judicial review. A brief summary of some of these special petition statutes is included in Appendix A to this report. It demonstrates both the variety of as well as similarity among many of these statutory provisions.

A few of these petition statutes expressly mention APA Section 553(e) and their language gives support to the view that the "grant" of a Section 553(e) petition occurs at some point before the issuance of a final rule.[122] Where in enacting statutes after 1946 Congress purported to construe (and not amend) Section 553(e), its views regarding the meaning of that provision may be persuasive but are not dispositive of this issue.

Moreover, other petition statutes refer to petitions to "commence"[123] or "initiate"[124] a proceeding. In these instances it is clear from the language that the grant occurs prior to the formal beginning of the rulemaking.[125] The language of APA Section 553(e) differs significantly from these schemes, referring to petitions "for the issuance, amendment, or repeal of a rule."[126] Assuming a different intended meaning can be attributed to such differences in language,[127] these special statutes give support to the interpretation of Section 553(e) that a grant (i.e. final affirmative disposition) of an APA petition occurs not at or prior to commencement or initiation of a rulemaking but at its conclusion.

Some of the special petition statutes mandate Federal Register publication of the receipt[128] and/or denial of petitions.[129] However, the benefits of publication notice may be outweighed by its costs where publication is required in all cases falling under the statute.[130] In other instances Federal Register notice may not be enough to reach persons who should know of the pendency or disposition of a petition.[131] In the case of a denial, certainly the petitioner should be personally notified, as is the case under Section 555(e).[132]

2. Regulatory Flexibility/Impact Analysis and the Regulatory Planning Process

Regulation of the federal rulemaking process has its sources not only in the Administrative Procedure Act and the organic statutes establishing various substantive programs but also in various other statutes and executive branch pronouncements. With regard to the petition process, the most significant of them are the Regulatory Flexibility Act (RFA),[133] Executive Orders 12,291[134] and 12,498,[135] and the directives of the Office of Management and Budget implementing those Orders.[136] Appendix B to this report describes both the substantive and procedural impact of these on the petition process.

III.

Agency Petition Regulations: Overview, Observations and Conclusions

There is considerable variation among federal agencies regarding the extent to which they have adopted procedural rules or other written statements describing or prescribing their petition processes. Some have none;[137] others largely mirror, without elaborating much on, statutory procedures;[138] and still others have adopted rather detailed requirements for and descriptions of their petition processes going considerably beyond the procedures expressly mandated by statute.[139] This variation can be attributed to a variety of factors (some interrelated) including the number of petitions filed, agency priorities in establishing a regulatory framework, differing views regarding the usefulness of elaborating such procedures in writing, and individual regulatory "style" of agency staff. A detailed overview of the extant written procedures is contained in Appendix B to this report. That summary is based primarily on procedural rules contained in the Code of Federal Regulations, where most agency statements of the various petition processes are found.

Two principal issues must be addressed. As a general matter should an agency adopt some written statement of the procedures applicable to the receipt, consideration and disposition of APA or other statutory petitions for rulemaking? If so, what factors should it consider in designing this framework?

With minor exceptions,[140] agencies are not expressly mandated by the petition statutes to adopt procedural rules or other written statements that prescribe or describe their petition processes. The Freedom of Information Act, however, requires not necessarily "rules" but some public statement of various matters pertaining to the petition process.[141]

Some agencies deal with some or all rulemaking petitions on an ad hoc basis, without implementing rules, written directives or guidelines.[142] Where few petitions are filed, such an approach may seem expedient from the agency's point of view. In fact the existence of regulations may expose the agency to judicial reversal in those instances where the procedural requirements are arbitrarily disregarded.[143] As we will see, in holding that denials of petitions are generally subject to judicial review, the courts have indicated that procedural deficiencies may be particularly vulnerable to judicial correction.[144]

However, such reasons alone do not justify ignoring the Freedom of Information Act, the legislative history of the APA[145] and the dictates of good administrative practice[146] which suggest, on the contrary, that implementing regulations, public statements and/or internal directives prescribing or describing the petition processes are required. While many petitions may present unique problems for an agency, it is unlikely that their uniqueness overwhelms the ability to discern and articulate basic similarities in the process for receiving, considering and disposing of such petitions.

In dealing with agency regulation of the petition process, three distinct, though interrelated, matters are presented:

a. the need for the agency to make the formal decision regarding what the process should as a general matter look like rather than treat petitions on an ad hoc basis;

b. the need for a written description of the process as formulated by the decisionmakers; and

c. the need for making that process known to persons in the agency who will be responsible for processing petitions and to prospective petitioners.

The written description may be called a rule, staff manual, order, directive or other type of pronouncement. Its existence obviously indicates that the agency has in fact made a decision regarding what the petition process should look like but does not necessarily assure that affected persons will be aware of its terms. In part the Freedom of Information Act attempts to solve this last problem.

The purposes advanced by the existence of a set of implementing rules, directives or other written statements of the petition process(es) include the following:

1. Such statements reinforce the priority assigned by the APA, and arguably other petition statutes, to the disposition of petitions for rulemaking.[147] The very existence of these indicates to the public, as well as the agency's own employees, that the agency considers response to petitions an important part of its work and in so doing may help focus staff attention on their expeditious and well-considered handling. By sketching the course of a petition from filing to disposition, a routine is established, the very existence of which, if adhered to, may also assist in this regard.

2. Such statements conserve agency resources. By prescribing such matters as form of petition, the agency can more easily segregate those communications that are entitled to the priority treatment accorded petitions by statute from "correspondence" or "complaints" that do not.[148] Such requirements may also assure that the agency obtains at the outset the type of information needed for a decision. They also reduce the need to respond to citizen inquiries with respect to the required contents of a petition. By establishing at least the

minimal outlines of a routine, resources in handling petitions may be saved.

3. Such statements advise prospective petitioners what is necessary to activate the agency consideration required for proposals that qualify as petitions. Guesswork by the petitioner, which may undercut its chances of success, may be reduced substantially.[149]

4. Such statements, by limiting discretion, may help the agency eliminate instances of unequal treatment of petitioners.[150]

Written statements of the petition process would appear to be valuable even though, to a significant extent, they may expressly mirror the discretion in the manner of processing petitions reserved by the agency. Such discretion may include whether or not to issue a public notice of receipt of a petition in order to solicit comments from interested persons, to hold a meeting, hearing or conference, or to publish notice of a denial. At least both staff and the public are advised regarding the possible alternative actions available where they are specified in, for example, a rule and they can direct their attention to arguing for or calculating the costs and benefits of those designated alternatives.

Neither the APA nor generally the special petition statutes describe the petition process in any great detail.[151] If an agency adopts regulations or other written statements that merely mimic, without more, these statutory provisions,[152] the above described purposes will simply not be fully achieved.

Therefore, agency statements must elaborate to some degree on the statutory language, though how much should in the end vary to a great degree with each agency. In tailoring its set of procedural regulations applicable to the petition process, the agency must consider, among other things, the substantive policy mandates of governing statutes, the nature of the sector of the public the agency serves and/or regulates, as well as the degree to which uniqueness may characterize the matters raised in petitions that may be filed.

For example, if the organic statute creating the program administered by the agency requires that the agency make various findings of law or of scientific fact before adopting a particular standard, a requirement that the petitioner submit certain specific types of technical information or address certain issues of law or fact may expedite processing the petition and save agency resources along the way.[153] Where the agency's "clientele" possesses an effective network for discovering and publicizing matters of common interest through, for example, newsletters or trade magazines, Federal Register publication of notice of filing a petition may be unnecessary to solicit comments.[154] A final example relates to the volume of petition business. While the number of petitions filed with an agency should not determine whether or not regulations or other written directives should be adopted,[155] it might suggest, in some instances, and at times in connection with other factors, the elaborateness with which the process is regulated. The more the volume, potentially the more need there is for a clearly established administrative routine and the more agency resources, such as answering inquiries regarding the form of petition, that might be saved through a detailed framework for filing and decisionmaking.

All of this suggests that there is good reason for variation between, and even within, agencies[156] with respect to procedures applicable to the petition process and even for encouraging the adoption of procedural regulations that do not always impose hard and fast requirements but permit the exercise of some discretion.

Somewhat along this same line, the agency should have and exercise reasoned discretion to overlook non-compliance by petitioners with its petition regulations, in particular requirements regarding the form of documents, though of course this discretion must be exercised with some restraint or the existence of the regulations fails to serve the purposes outlined above.[157] Several agencies have rules that specifically state that non-compliance means that a document will be treated as routine correspondence,[158] a pronouncement that has much to recommend it in terms of putting the public on notice of the consequences of failure to comply.

The Consumer Product Safety Commission is apparently alone in its distinction between the provisions of its regulations that must generally be complied with ("requirements")[159] for a document to be treated as a petition and processed accordingly and those with which compliance is only encouraged ("recommendations").[160] Where an agency has determined the bare minimum of what it wants (and needs) to demand of petitioners, such an approach avoids the spectre of agency disregard of its own express procedural mandates when it accepts as a petition something which fails to meet what appear to be the generally applicable requirements. At the same time the agency gives guidance to those petitioners who have the knowledge and resources to supply the agency with all that is necessary to expeditiously dispose of the petition. The approach obviously evidences a thoughtful and generally hospitable attitude toward the petition process.[161]

Quite a few agencies have two or more sets of petition regulations,[162] and this is often based on the fact that the regulations relate to different substantive programs[163] which may be administered by different parts of the same agency. On the assumption that a petitioner may be most familiar with and/or likely to resort to regulations contained in the part of the Code of Federal Regulations pertaining to the substantive program of interest to it, the publication by an agency of several sets of regulations, even if largely identical,[164] may seem to make some sense, though, as noted below, more efficient ways of effecting the same goal may be available.[165] Substantial variation within an agency among sets of petition regulations where the variation is not apparently responsive to statutory command or such factors as those listed above[166] is not, however, defensible and suggests a lack of communication within or an oversight by the agency. An example here seems to be the Department of Housing and Urban Development which has a set of regulations generally applicable[167] and one applicable specifically to the Interstate Land Sales Disclosure Act.[168] The latter, but not the former, imposes various time limits for agency action on petitions, provides for the holding of public hearings, requires that a copy of the notice of proposed rulemaking be sent to petitioner and contains various differences of form and style.[169]

In order to avoid inconsistency of treatment of petitions where such inconsistency has no reasoned basis, provide economy of statement of procedures, and mitigate confusion by outsiders dealing with the agency, the following general approach to the arrangement within the Code of Federal Regulations of agency petition procedures appears advisable where the agency administers more than one substantive program:

1. Where there is no reason to differentiate the petition procedures for each program, the agency should publish one set of procedures in the section of the Code of Federal Regulations governing its general practices. To facilitate location of those by potential petitioners focused on one particular program, a brief reference back to the general set of petition procedures should be, where appropriate, inserted in those regulations which are specifically applicable to each substantive program. A general requirement that the petitioner state expressly in the petition the legal authority for the adoption of the regulations proposed can help sorting out to which substantive program office the petition should be forwarded for action.

2. Where the agency administers more than one substantive program but, as will generally be the case, a substantial degree of uniformity in treatment of all petitions is possible, the same approach described above is generally appropriate with the following exception. Where a substantive program requires, because of statutory or other factors mentioned previously,[170] a procedure different from or in addition to those generally applicable (including vesting greater or less discretion to take certain types of action with regard to treatment of petitions), the part of the Code of Federal Regulations relating specifically to that program should contain both cross references to the general set of petition regulations, where applicable, and also set forth the distinct petition procedures relevant to that program. For example, for ease of administration the docket room for one program may be at a different location than for others and this difference can be noted in the specific set of petition regulations. Of course, in some instances clarity of statement may require a self-contained petition regulation pertaining to a particular program despite the similarity of such petition process to the general one.

3. Where uniformity of treatment of petitions addressed to different substantive programs cannot be achieved to any substantial degree, probably a rare situation, the petition procedures designed for each program should be placed in the part of the Code of Federal Regulations containing the other rules specifically applicable to that program.

Such an arrangement may also help to avoid a serious problem: underinclusiveness of agency petition regulations. For example, some agencies have petition regulations applicable to one set of rules or one program, but not to others.[171] The frequency of occurrence of this is not altogether clear, though an impressionistic judgment suggests that it may be a very common problem. Some of the petition regulations may purport to implement, not Section 553(e) but other statutory petition provisions,[172] though those provisions do not encompass the entire sphere of the agency's substantive rulemaking authority.

Another type of underinclusiveness is the failure of petition regulations implementing Section 553(e) to cover, or at least _clearly_ extend to,[173] all of the types of "rules" within the scope of Section 553(e), that is, not only substantive rules but also interpretative rules, general statements of policy and rules of agency organization, procedure and practice.[174] There is no reason not to expressly encompass these rules within the scope of published petition procedures. The same reasons favoring the adoption of petition procedures operate here as elsewhere. In fact the argument for formal petition procedures with regard to these types of rules is particularly strong since the APA does not mandate notice and opportunity for comment from interested persons prior to adoption of these rules.[175] The petition process is a way of forcing the agency, albeit after the fact, to consider specific arguments against adoption. Written agency procedures with regard to the handling of petitions may help assure that these arguments are not taken lightly and are disposed of expeditiously.

While petition regulations or directives of some type should be adopted by each agency to apply to all grants to it of substantive and other rulemaking authority, is it possible to recommend the basic outlines of a set of petition regulations for uniform adoption when it is conceded that each agency should possess substantial discretion to treat the petitions it receives in a distinctive fashion? Before answering this question, two types of agency discretion must be distinguished: (1) agency discretion to impose more procedural formality than any recommended set of guidelines suggest, discretion clearly required by the existence of different statutory directives and other factors; and (2) agency discretion expressly reserved or described in any set of proposed procedures to take one rather than another step in the processing of a particular petition. Proposal of a uniform set of regulations is facilitated by their incorporation of provisions recognizing the latter type of discretion, which provisions are in turn based on the assumption that mandating a particular procedure for all petitions of the same type may be unwarranted. At the same time specification in the regulations of the possible alternative actions that might be taken serves an important purpose[176] and, at any rate, the model set need not be without its mandatory provisions.

With regard to this model set, it is difficult to summon a viable argument against the establishment of certain specific requirements in view, most importantly, of (1) a prospective petitioner's need to know minimally what is expected of him or her in order to activate the obligation for receipt, consideration and disposition of petitions, (2) the agency's need to conserve its resources, and (3) the reviewing court's needs in order to conduct whatever judicial review may be permitted. The general contours[177] of the body of regulations pertaining to the petition process,[178] as well as the agency experience with handling petitions, provides insight into exactly what these minimal petition procedures should be.[179]

Adoption of this set of model regulations by Congress, or uniformly by the agencies themselves, may obviate to a great extent the need for many special petition statutes. The proposed regulations equal or exceed the statutory requirements and, in many instances where they give less, there is good reason for it, suggesting that the statutory procedures are excessively restrictive. Upon repeal of many of these statutory provisions, the federal petition process with regard to rulemaking by federal agencies would possess the following overall structure:

I. Minimum Petition Rules [Directives]: Each agency with rulemaking power would adopt at least one set of these, which would expressly reserve discretion to the agency to take or omit certain types of action with respect to the receipt, consideration and disposition of petitions.

II. Special Petition Rules [Directives]: Each agency could impose additional requirements for receipt, consideration and disposition of petitions (or expressly reserve the discretion to take certain actions). Such regulations [directives] would either--

    A. apply to all programs administered by the agency; or

    B. only certain of those programs or parts thereof.

III. Exceptional Cases: In exceptional circumstances, if such exist, an agency might depart from the uniform rules or even adopt an ad hoc approach to deal with a distinct class of petitions. Congress could specify that an agency is authorized to adopt this course of action only after publishing its reasons for doing so following opportunity for public comment.

IV.

Agency Petition Practice

A. In General: Responses to Agency Questionnaire

For the purposes of this study, a questionnaire was sent to obtain certain basic information regarding federal agency petition practice.[180] The addresses included the major executive departments, or certain of their components, as well as the independent commissions.[181] Responses from almost all[182] were received. They disclose several significant general features of the existing framework for the receipt, consideration and disposition of petitions.

More than thirteen of the forty-six responding agencies do not currently have any set of procedural regulations specifically governing rulemaking petitions.[183] The applicability of APA Section 553(a)[184] to the agency was not invoked as the reason. Where an explanation was offered, the one most frequently advanced was the lack of any[185] or substantial[186] petition business. The ease of informal communication of suggestions to the agency from "outsiders" was suggested on several occasions as a reason for the dearth of petitions and the consequent lack of need for petition regulations.[187] Another reason given for the lack of implementing regulations was that other agency business had a "higher priority."[188]

There are agencies, however, which have not been confronted with a significant number of petition filings which nevertheless have procedural regulations implementing APA Section 553(e).[189] The National Labor Relations Board is an example of the latter.[190] It explained its small number of filings by the fact that the agency rarely engages in substantive rulemaking.[191] Where Congress has enacted a special petition statute, almost invariably the agency has adopted some implementing regulations, though they may no more than largely repeat the statutory provisions.[192]

A few agencies have manuals, internal memoranda, orders or directives to staff that describe the procedure for the receipt, consideration and disposition of rulemaking petitions.[193] Even where they do exist, they may be rather short and general and focus on the allocation of responsibility within the agency for various aspects of the processing of the petition.[194] There are several instances, however, where the express internal ordering by written directive takes a very elaborate form.[195] In several cases, the petition process is not governed by a procedural rule published in the Code of Regulations but by internal memoranda or directive.[196]

There appears to be some substantial correspondence between the existence of petition rules, staff manuals, orders or directives, along with their elaborateness, and the number of petition filings reported by the agency. In other words, the greater the number of petition filings the more likely the agency has adopted a statement or statements describing or prescribing the process for their disposition and the greater the likelihood that these will be detailed in some degree. While it might be argued that the absence of regulations has some deterrent effect on the filing of petitions, this study disclosed no empirical support for this proposition. Any person insistent on communicating his or her proposals for regulatory change to an agency will probably do so without regard to the existence of an express agency process for receiving and acting on them, though if they are treated as ordinary correspondence the priority assigned by the APA to the consideration and disposition of petitions may be lacking.

Ranking agencies according to number of rulemaking petition filings alone is difficult for a variety of reasons, including the fact that some do not maintain statistics in such a way as to easily distinguish rulemaking petitions from others, or requested general-rulemaking from rulemaking of a more specialized sort which is not the focus of this study.[197] Therefore, the available statistics can convey only a general sense of where petition filings are most common. With this caveat, the following listing of some of the busiest agencies, along with the approximate number of petitions filed each year, is set forth:

Food & Drug Administration (289)[198]

Environmental Protection Agency (over 200)[199]

Federal Communications Commission (72)[200]

National Highway Traffic Safety Administration (20-25)[201]

Interstate Commerce Commission (less than 20)[202]

Department of Energy (over 17)[203]

Federal Aviation Administration (15)[204]

Department of the Interior (15)[205]

Federal Highway Administration (10-15)[206]

Bureau of Alcohol, Tobacco and Firearms (Treasury) (12)[207]

Federal Energy Regulatory Commission (less than 12)[208]

Veterans Administration (less than 10)[209]

Department of Agriculture (Food Safety and Inspection Service) (8)[210]

Consumer Product Safety Commission (6)[211]

Nuclear Regulatory Commission (4-6)[212]

Occupational Safety and Health Administration (4-6)[213]

Commodity Futures Trading Commission (4-6)[214]

Since this list includes the agencies that most frequently receive petitions among all those surveyed, one of the most obvious conclusions is that the scope of petition activity is generally not great except with respect to certain programs and these may involve specialized rulemaking which is not the focus of this study.[214a] This is due to a variety of factors including the current deregulatory climate and consequent perception by potential petitioners that their requests for more (rather than less) regulation will not be favorably acted upon,[215] the expected delay in agency action on petitions filed,[216] and the availability of means other than petitions for influencing agency action, including informal contacts[217] and lawsuits.[218]

Of course an inter-agency comparison of the numbers of petitions filed is somewhat deceptive. It does not necessarily indicate how much agency time and resources are expended on the processing of petitions since the nature of the issues raised, among other things, can make the decision-making process very complex and time-consuming for some agencies and not for others. Similarly a comparison between agencies with regard to the number of grants or denials reveals nothing significant by itself. For whatever it is worth, denials generally seem to outnumber grants among agencies responding.

Rarely do the agencies expressly impose time limits applicable to their disposition of petitions where there is no underlying statutory time limit. Also unusual are instances where the process for responding to a rule-making petition differs depending on whether the requested change relates to the issuance, amendment or repeal of a rule.

With respect to the time for disposing of petitions, the available statistics are so sparse that drawing any general conclusions is impossible. For instance, it cannot be said with any certainty based on agency responses whether the existence of a written petition process or time limits for agency action, imposed by statute or otherwise, assures more expeditious disposition of petitions than might otherwise occur. Delay in meeting deadlines, however, does appear common. Statistics in this area can, moreover, be very misleading since an agency's interpretation of what constitutes a final disposition of a petition can substantially affect its reported processing time. If, for example, a "grant" is considered to occur only with the issuance of a final regulation, it is more likely that delay will be reported given the lengthy nature of certain types of rulemaking.[219] On the other hand, if a "grant" means no more than a friendly letter thanking the petitioner for a good idea or signifies the intention to begin a rulemaking sometime in the near future, the final disposition rate may seem impressive.

B. Seven Case Studies

In order to obtain a more complete understanding of agency petition practice than the format of a questionnaire permitted, interviews were conducted with the personnel of several agencies, petition files were reviewed, and the organization and operation of docket rooms were studied.

The choice of an agency for this more intensive examination was dictated by a variety of considerations, the most important of which were the following:

i. Volume of Petition Filings

Agencies with significant experience in handling petitions were chosen on the assumption that some of their experience might be usefully relied upon by other agencies, or at least those operating in similar regulatory contexts. By the same token, agencies with comparatively little petition activity were included for their points of view.

ii. Elaborateness of Written Petition Procedures

The degree to which an agency expressly regulates the petition process was considered. The alternative approaches on this score range from having no procedural rules on the books, to intermediate complexity, and finally to rather elaborate frameworks for disposing of petitions for rule-making. This criterion permitted exploration of the reasons for the degree of procedural variety currently existing in the petition area, which reasons might have some generally applicable implications.

iii. Statutory Petition Procedures

By choosing some agencies subject to specific petition statutes, particular problems experienced in their administration might be discovered and conclusions drawn that could have broad applicability.

iv. Regulatory Jurisdiction

An attempt was made to cover as much of the spectrum of current federal regulatory activity as possible, including natural resources and energy, business regulation, consumer protection, and public health and safety. Issues peculiar to these areas might call for specific tailoring of any general recommendations made.

The results of this process of choice and the ensuing investigation follow.

1. Department of Health and Human Services: Food and Drug Administration (FDA)

Much of the substantive regulatory activity of the Food and Drug Administration of the Department of Health and Human Services is currently conducted through four "centers": Devices and Radiological Health, Drugs and Biologics, Food Safety and Applied Nutrition, and Veternary Medicine. Responding to petitions, whether for rulemaking or other action, constitutes a significant portion of FDA's business. As indicated in Appendix A,[220] the agency is subject to several statutes that regulate to some extent the procedural manner in which it responds to the filing of petitions for rulemaking. The agency has elaborated considerably on those[221] as well as established a framework for filing, considering and responding to those petitions whose treatment is governed only by very general statutory regulation, such as found in the APA. Unless more specific regulations are applicable to the subject matter of a petition,[222] petitions for rulemaking are governed by the procedures for so-called "citizen petitions" found largely in 21 CFR §§ 10.20, 10.30, and 10.33.[223]

Any "interested" person may petition the agency for the issuance, amendment or revocation of a regulation within FDA's statutory jurisdiction.[224] The regulations do not, however, require the petitioner to state its "interest" in the subject matter of the action[225] and the FDA has not interpreted the APA reference to "interest" in a technical or legalistic fashion.[226] Anyone is eligible to file a petition.

A petition must be filed (in quadruplicate) with the Dockets Management Branch[227] which is located in Rockville, Maryland. It must meet certain requirements of form.[228] Most importantly, it must identify the relevant statutory authority for regulation; furnish "the exact wording of the existing regulation" sought to be amended or revoked and describe "the proposed regulation or amendment requested";[229] state the factual and legal grounds for the action sought;[230] and set forth the information relied upon along with "representative information known" to the petitioner which is unfavorable to the petitioner's position.[231] In some instances environmental or economic impact information may be required.[232] Finally, the petition must be signed[233] and certified by the petitioner or its representative.[234] Any petitioner wishing to submit information but protect it from public disclosure must follow designated requirements.[235]

The Dockets Management Branch has the responsibility for examining a purported petition to ascertain whether it meets these technical requirements[236] and, if it does not, for returning it to the petitioner with a copy of the applicable regulations indicating which provisions have not been complied with.[237] While some documents have been accepted for filing as petitions which have not fully complied with these requirements,[238] recently the agency has been less willing to waive them in certain particulars.[239] The regulations expressly provide that "correspondence" does not constitute a petition unless it meets the applicable requirements.[240]

If a petition meets these format requirements, it is filed, stamped with the date of filing and assigned a docket number.[241] The file created by Dockets Management contains all submissions related to the petition.[242] The petition and any comments on it are expressly subject to public inspection and copying.[243]

The Dockets Management Branch notifies the petitioner in writing of the filing and the docket number of the petition.[244] It maintains a chronological list of filed petitions including the docket number, date of filing, name of petitioner, subject matter and disposition of petition.[245] It also prepares a public log for each petition file listing its contents. On a monthly basis it circulates to each Center a report summarizing petition filings during the reporting period as well as pending petitions not disposed of.[246]

Following the filing, Dockets Management has the responsibility for determining which Center has subject matter jurisdiction over the petition and makes the appropriate reference.[247] Thereafter initial decisionmaking authority with regard to the petition lies with the Center, each of which is responsible for "tracking" petitions referred to it in order to insure compliance with applicable deadlines for action and final disposition.[248] The Docket Management Branch's monthly status memorandum can be used for tracking purposes but it appears that the Centers rely primarily on their own records for these purposes.[249]

With the exception of any applicable statutory time limits for action,[250] the principal deadline is self-imposed. It requires that the agency furnish a response to each petitioner within 180 days of receipt of the petition.[251] However that response need only be a "tentative" or "interim" one indicating why the agency has not been able to reach a final decision with regard to the disposition of the petition.[252] Authority to issue these interim responses has generally been delegated to each Center.[253] Non-compliance with this deadline is not infrequent,[254] though the personnel of some Centers reported high compliance rates.[255] FDA officials interviewed considered such a deadline a good management technique for forcing action on petitions.[256]

The regulations afford "interested persons" the opportunity to submit written comments regarding filed petitions,[257] which comments are included in the docket file[258] with copies to the Centers.[259] While FDA regulations indicate that Federal Register notice is a means that the agency might employ in considering preliminarily what action to take on a petition,[260] the agency infrequently publishes notice of the receipt of these petitions for rulemaking where there is no statutory requirement for such publication.[261] Non-publication is apparently due to several considerations[262]: the APA does not require solicitation of views prior to action on petitions, unless of course the agency desires to adopt the proposal as a final rule[263]; the agency has limited resources but many demands on its budget; there is a very active "trade press" that keeps close scrutiny over FDA's activities and advises its readership of recent filings[264]; the likelihood of comments forthcoming may be slight due to the lack of interest in the subject matter of many petitions; and the agency has in-house expertise deemed adequate to evaluate the merits of many petitions.

The decision to publish is made on an ad hoc basis, initially at the Center level, with consideration given to the agency needs for additional information and the desire to obtain public input into the decisionmaking process.[265] Other than Federal Register publication, press releases and letters to potentially interested persons or organizations may be used by the agency to alert them to the filing of a petition.[266] Whether for lack of publication, lack of interest or other reasons, it is the exceptional case where a petition filing generates more than a modest number of comments.[267]

The applicable regulations provide a variety of other means for soliciting the views of outsiders with regard to a petition at the preliminary stage of consideration.[268] These include conferences, meetings, and hearings.[269]

While the responsibility for issuing an interim response has been delegated to the Centers, the FDA Commissioner or his delegate (usually the Associate Commissioner for Regulatory Affairs) retains the authority to finally approve a petition for rulemaking[270] and formally launch a rulemaking[271] or deny the petition in whole or part.[272] The FDA has announced that its decision in this regard will take into account "available agency resources,"[273] "the priority assigned to the petition,"[274] and statutory time deadlines.[275]

The contents of the exclusive record for decision[276] are described in the regulations[277] to include the petition, comments, applicable Federal Register notices, letters to the petitioner with regard to grant or denial, hearing transcripts, as well as "all information identified or filed by the Commissioner with the Dockets Management Branch as part of the record supporting the decision."[278] This record may include letters or memoranda reflecting contacts between agency personnel and outsiders which took place during agency consideration of the petition[279] and, less frequently, intragency memoranda and reports relating to the petition.[280] This record is folded into the rulemaking record if a rulemaking is launched.[281]

Sometimes a decision to deny the petition will be published in the Register,[282] though this may be rare.[283] Regardless of the final disposition, the petitioner is notified in writing of the decision.[284]

Within 30 days of the final decision on a petition, the petitioner (or any interested person) may request reconsideration[285] based on information contained in the original administrative record.[286] The requirements for form of request, filing, and opportunity for comment are very similar to those applicable to the original petition.[287]

In 1985, the FDA received a total of 217 citizen petitions.[288] Since the agency records do not separate petitions for rulemaking from other types of citizen petitions, it would be impossible to identify how many of the former are filed annually without reviewing all petitions individually.[289] When asked to evaluate the effects of the FDA petition process generally, agency officials suggested that it did compel the agency as a whole to listen[290] and make a decision one way or the other on proposed regulatory changes, where ordinary correspondence might not achieve that result.[291] There was some doubt expressed, however, whether it had been a significant source for regulatory policy initiatives that were not already under consideration somewhere in FDA.[292] Some Center officials emphasized the equivalent (or greater in some instances) effect of informal contacts with the agency in transmitting ideas and obtaining regulatory changes.[293]

It was suggested at several points that the petition process might serve in at least some cases as a recourse of last resort where informal importuning was unsuccessful.[294] On the other hand, the agency itself might favor a particular change yet refer regulated parties to the petition process to obtain relief where the agency does not want to appear publicly to be weakening regulation on its own initiative[295] or, in the current deregulatory climate, prefer that the initiative for increased regulation come from the public.

The priority assigned to handling rulemaking petitions varies depending on the subject. With regard to allocating agency resources generally, one official suggested that most citizen petitions have a lower priority than other regulatory matters which demand agency attention.[296] Yet at times where the action requested involves serious safety issues or is related to pending litigation, existing priorities may take a back seat to the resolution of an issue presented by a petition.[297]

2. Federal Communications Commission (FCC)

The only statutory petition provision applicable to the FCC is APA Section 553(e).[298] Any "interested" person may, therefore, petition the FCC for the issuance, amendment or repeal of a rule or regulation.[299] As in the case of the FDA,[300] the Commission does not interpret the term "interest" in a technical or legalistic fashion.[301] There is a paucity of FCC precedents interpreting the term "interested" as used in this context, perhaps because the Commission ordinarily focuses on the merits of the petition, and, if it believes the petition is otherwise meritorious, it rarely, if ever, will dismiss a petition for rulemaking for lack of standing.[302]

A petition must be submitted or mailed to the Secretary of the Commission, whose office is located in Washington.[303] Detailed requirements for the form of documents submitted, such as paper size, spacing, margins,[304] signature and verification[305] and number of copies[306] must be complied with.[307] A document submitted as a petition must also include the text or substance of the proposed rule together with all facts, views, arguments and data deemed to support the action requested and show how the interests of the petitioner will be affected.[308]

Upon receipt the Secretary's Office forwards the document to the appropriate Office or Bureau[310] where the principal workload operations of the FCC are conducted.[311] The Bureaus of concern for the study were Mass Media, Common Carrier and Private Radio.[312]

Following such a reference, the Bureau assigned the document must make two decisions. First, it must ascertain whether the document satisfies the requirements for a petition laid down by the Commission's regulations. If it does not, the petitioner is so notified[313] and may, if it wishes, refile. However, the agency has treated as petitions communications that do not meet the literal mandates of the regulations.[314] Secondly, if the document is accepted as a petition for rulemaking, the Bureau, with or without consultation with other parts of the agency, decides whether it should be summarily denied or dismissed without prejudice on the basis that it is "moot, premature, repetitive, frivolous or . . plainly do[es] not warrant consideration by the Commission."[315] Apparently the inclination to dismiss summarily varies from bureau to bureau.[316] The petitioner is informed by letter of such a dismissal[317] and may petition for reconsideration,[318] which proceeding is governed by the same procedural regulations applicable generally to petitions for reconsideration.[319] There is no formal docket file opened or index maintained that includes petitions denied summarily.[320]

If the document both meets the formal requirements and escapes summary dismissal, the Dockets Branch opens a public file for the petition[321] which is assigned an "RM" (rulemaking) number.[322] At that point a docket history is prepared which includes, inter alia, the RM number, the subject of the petition, the name of the petitioner, the name of those filing the petition on its behalf, and the date of filing.[323] This is updated to include a chronological list of further action on the petition, such as comments and reply comments filed (when, by and for whom), Federal Register notices and disposition of the petition. The Secretary's Office is currently compiling histories by means of computer technology rather than file cards[324] and eventually the data base will be made available to a third party contractor who, for a fee, will supply printouts or on-line access to interested persons.[325] The old file card history and the computerized history are and will remain open for public inspection (without a fee).[326] The files themselves are so available[327] at the Commission's Docket Reference Room in Washington[328] and include all the documents referenced in the docket history arranged in chronological order.[329] While the Dockets Branch has no formal responsibility for tracking petitions for rulemaking to insure their expeditious disposition,[330] it does answer public inquiries regarding the status of petitions as that status is evident from an examination of the history card.[331] Moreover personnel of the Branch may contact a Bureau to ascertain what action, if any, has been taken on the petition in order to determine whether to close the file.[332]

Once a petition has been assigned an "RM" number, a "public notice" is given by means of a Commission release.[333] Essentially what occurs is that a written document is prepared which is entitled "public notice" and lists the "rm" number, rule affected, name of petitioner, name and address of the person who filed the petition on its behalf, the date the petition was received and a general statement of the nature of the petition.[334] Copies of it are made available at the offices of the FCC's Press and News Media Division[335] and commercial subscription services provide these to their subscribers. The purpose of this notice is to solicit comments on the petition by interested persons. Federal Register notice of receipt is expensive[336] and, at any rate, the assumption seems to be that persons who might have something significant to say will find out about the petition through the news media or otherwise.

Within 30 days after public notice is given, interested persons may file statements in support or opposition to the petition.[337] Such statements are included in the "rm" file in the order in which they are received.[338] They must be accompanied by proof of service on the petitioner[339] and conform to the same form, signature and copy requirements which are applicable to the original petition.[340] Replies to these statements, by the petitioner or others, may be filed within fifteen days of the filing of the statements.[341] Such reply comments must be accompanied by proof of service on the party or parties filing the statement or statements to which the reply is directed and conform to the same form, signature and copy requirements.[342] The explanation offered for this two stage comment process was that most comments tend to be filed at the last moment and, absent a provision for a separate period reserved for replies, rebutting material in comments might be made more difficult.[344]

Some officials expressed the view that the mandatory comment process could be eliminated without losing much of value.[345] This was based on the perception that the Bureaus generally possess enough expertise to adequately evaluate most petitions by themselves,[346] and that the nature of many comments is predictable.[347] Where a petition clearly deserves to be issued as a notice of proposed rulemaking, the comment period may contribute unnecessary delay of over a month to the rulemaking process. It was suggested that where appropriate, public or private solicitation of outside views on a petition could be undertaken at the discretion of the Bureau concerned at the preliminary stage of consideration.[348] Under this revised scheme, for petitions surviving summary dismissal, solicitation of outside views would usually come at the notice of proposed rulemaking stage when the most valuable outside input is apparently now generally found.

With regard to the strict format requirements for petitions and comments,[349] the less sophisticated or experienced are most likely to violate these and yet it is in just such instances where non-compliance may be overlooked.[350] Phrasing these as "recommendations" and not "requirements" would appear to be the preferable course to take,[351] if they are retained.

Requiring service of comments and replies is certainly a convenience of sorts to the petitioner and commentators and may in fact be most helpful to persons who are not members of the communications bar or those who cannot themselves easily visit the FCC docket room. However, persons (other than the petitioner) seeking to reply to statements in support or opposition to the petition must still check the docket file. If service is deemed important, regulating the manner and proof of service in some detail, as is FCC practice, would seem to follow as matter of course.

The comment process is the usual mode of soliciting information from sources outside the FCC regarding the advisability of granting or denying a petition for rulemaking. On some occasions, however, a notice of inquiry, which is similar to an advance notice of proposed rulemaking,[352] may be published in the Register in order to investigate the merits of a petitioner's proposal.[353] Comments are filed in the same manner as in response to a "public notice."[354] Even more rare is a public hearing.[355]

Once the comment process has run its course (generally 45 days after the public notice of the filing of a petition has been given) the Commission may act at any time.[356] With one exception,[357] the Commission is not subject to any statutory time deadlines for action on petitions[358] nor has the agency or its bureaus adopted uniform timelines for the disposition, summarily or otherwise, of rulemaking requests.[359] The Commission has adopted a "management by objectives" system[360] whereby, to a large extent, agendas for action are generated initially by negotiation among the Chairman of the Commission, the Managing Director, and the Bureau Chief and later by negotiation between the Bureau Chief and his subordinates.[360a] It is these agendas that result in the timing of final action on petitions.[361] Similarly, tracking is done primarily within the bureau,[362] though the Office of the Managing Director may on occasion become involved.[363]

A non-summary denial of a petition, which may be by memorandum opinion and order of the full Commission,[364] is marked by the issuance of a "public notice" indicating the "rm" number, the rule affected, the petitioner, date the petition was received, nature of the petition, date of disposition, and date of public release of the decision.[365] The order dismissing the petition gives the reasons[366] and is sent to the petitoner.[367] Generally orders that deny a petition are not published in the Register.[368]

The grant of a petition is similarly included in a "public notice." The petitioner is personally notified.[369] The grant is followed by the issuance of a notice of proposed rulemaking, or in some cases, issuance of a final rule.[370] Generally only the Commission may grant a petition since rulemaking authority is largely vested in it.[371] While Section 553(a) of the APA is the only applicable statutory petition provision, the FCC, like some other agencies,[372] appears to take the position that grant of a petition for rulemaking can be considered to occur prior to the issuance of a final rule conforming to petitioner's requests.[373]

The FCC regulations do not expressly define the record for decision on a petition. However it includes, at the least, the petition, public notices and the comments, all of which are found in the public file.[374] That file might in some instances include internally generated studies.[375] If the petition is granted, the docket history so indicates. When a rulemaking is commenced, a docket number is assigned to the proceeding and all documents associated with the petition are incorporated into the docket file.[376]

Any interested person may petition for reconsideration of a decision on a petition.[377] Where the action at issue was taken by the Commission, the Commission will act on this petition. Where the action was taken by the staff pursuant to a delegation of authority, the petition may be acted on by the staff or referred to the Commision.[378] Such petitions may rely on facts not previously presented to the Commission.[379] Federal Register notice of the filing of the petition is required[380] and is followed by statements in opposition[381] and replies to those.[382] The order granting or denying the petition will state the reasons for the action.[383] The same procedures apply to petitions to reconsider the final adoption of rules.[384]

For the years 1983 through 1985 the FCC received, on the average, 72 petitions for rulemaking of all types.[385] Within this same period four petitions were granted, thirty-two were denied and twenty-one were dismissed.[386] In June 1986, there were approximately two hundred and forty-four petitions pending.[387] Obviously there is a substantial backlog of petitions. In fact delay has been the principal criticism voiced with regard to the agency's handling of petitions.[388]

In evaluating the value of the petition process from the point of view of contribution of regulatory proposals deemed by the agency to be meritorious, several officials interviewed suggested that in view of changes in technology the petition process is very important in keeping the FCC responsive to new developments[389] and that disposition of petitions was given high priority.[390] However another official suggested that in recent years, at least in some areas, the Commission has seemed to put more emphasis on pursuing internally initiated proposals.[391] As in the case of the FDA, informal contacts outside the petition process also provides valuable regulatory ideas.[392]

As noted above,[393] disposition of petitions constitutes one aspect of the agenda compiled as part of the FCC's management by objectives system and, accordingly, that activity is closely monitored by various officials in the Bureaus, the Managing Director's Office and the Commissioners. This gives some impetus to expeditious processing, though the apparent petition backlog indicates that it does not assure it in many instances.

Like the FDA, the existence of the rather elaborate petition regulations of the FCC suggests that the agency considers the handling of petitions an important, though perhaps not always welcome, aspect of its work. This attitude results in inclusion of their disposition as an objective in the management by objectives system which can help speed their processing. Obviously the more an agency believes it can learn from petitions the more likely it is to spend the time to create a petition framework where it can in the most efficient manner elicit the information necessary for decision. At any rate, since the APA itself mandates the receipt, consideration and expeditious disposition of petitions, it clearly is in the agency's interest, as well as the public's, to design a petition framework which can in a cost effective fashion identify worthy proposals for further study.

3. Federal Energy Regulatory Commission (FERC)

The Commission "encourages the public, including those persons subject to regulation by the Commission, to submit suggestions, comments, or proposals concerning substantial prospective regulatory policy issues and problems."[394] Ascertaining how to file a petition for rulemaking with the agency requires sorting through the generally applicable procedural rules of the Commission.[395] This examination discloses that a person must file a document known as a petition when seeking a rule of general applicability.[396] A petition is a "pleading"[397] which means that it is subject to the detailed requirements applicable to the content of a pleading.[398] For instance, it must include the name of the petitioner, the action sought, and the relevant facts.[399] It must be delivered or mailed to the Secretary of the Commission,[400] contain a heading which describes the nature of the filing,[401] and comply with various requirements for paper size,[402] format,[403] citation form,[405] number of copies[405] and signature.[406] If a document does not comply with applicable regulations, it may be rejected for filing[407] with an indication of the deficiencies.[408]

The Secretary of the Commission maintains a system for docketing proceedings,[409] including petitions. When a document is received for filing as a petition, it is assigned a docket number,[410] a file is opened[411] and the docket number and other pertinent information are recorded in the Commission's computerized tracking system.[412] Next the Division of Rulemaking and Legislative Analysis of the Office of General Counsel forwards a copy of the petition to each Commissioner and all interested offices of the agency for analysis and comment.[413] Generally they are requested to offer a preliminary recommendation within 30 days.[414]

The receipt of a petition for rulemaking is generally not published in the Federal Register as a means of receiving comments.[415] However apparently comments from persons outside the agency are received and filed in the docket file.[416] The Commission's rules in fact expressly provide that an "answer" can be made to any pleading unless the rules otherwise specify.[417] The content of an answer is regulated[418] and that document must also meet the agency's requirements for paper size,[419] format,[420] citation form,[421] copies,[422] and signature.[423] Answers must be served on the petitioner.[424] The fact that comments are received, when they are not directly solicited, is apparently due to an active trade press which publicizes the filing of petitions for rulemaking.[425] Unless the receipt of a petition is published in the Register, comments on it must be filed within 30 days of the filing of the petition.[426] The petition and answers are open to public inspection.[427]

After the receipt of comments from persons outside the agency and affected offices within the agency, the petition is assigned to the appropriate Assistant General Counsel for any further investigation.[428] After the completion of staff analysis, the Commission acts on the recommendations of the staff with regard to the petition.[429] If the petition is denied, the agency issues an explanation of the reasons for this action, which explanation is published in the Federal Register and the petitioner is provided personal notice of the denial.[430] If the petitioner desires to seek judicial review of the denial, the petitioner must request a rehearing first.[431]

The Commission is not subject to any statute other than APA Sections 553(e) and 555 which relates to petitions for rulemaking.[432] It has consistently interpreted the former to mean that the final affirmative disposition, that is a "grant," of a petition occurs only upon the final issuance, amendment, or repeal of the rule requested by the petitioner.[433] If the Commission believes that public comment would prove helpful, the petition is generally issued as a notice of proposed rulemaking or it is incorporated into such a notice.[434] However, work on the proposed rule is not begun until authorized by the Chairman, usually at the request of a technical office.[435] At this point a relatively strict timetable for agency action on the petition may be established.[436] If the rulemaking is ultimately terminated without the adoption of a rule, the petition is denied and the petitioner is notified.[437] If the ultimate rule adopted differs from the proposal in substantial respects, a denial occurs at that point and notification occurs.[438]

Compared to other agencies the volume of petitions filed with the FERC is not insubstantial. While the number varies from year to year, on the average the Commission receives somewhat less than twelve each year and grants or denies about one-third of those pending each year.[439] The average time for processing a petition from its filing to its grant or denial is approximately two years.[440] In September 1986, there were 26 petitions for rulemaking pending with the agency.[441] Since a grant is not considered to occur until final action is taken to adopt, revise or amend a regulation, statistics with regard to processing time may not be entirely comparable to those agencies which consider the grant to occur no later than the issuance of a notice of proposed rulemaking.[442]

In evaluating the adequacy of the FERC's practice of handling petitions for rulemaking, it must be kept in mind that the entities subject to regulation and their representatives tend to be very sophisticated in terms of the workings of the agency.[443] They keep themselves current on developments of interest by subscribing to the "trade press" and through that or other means gain knowledge of the filing of petitions.[444] In other words publication of receipt of a petition is not seen as necessary to solicit comments from interested persons. Moreover the agency itself appears to consider itself sufficiently capable of evaluating the merits of a proposal without the need for comments from the outside.[445] It is at the notice of proposed rulemaking stage that general solicitation of comments takes place, assuming the petition is not denied earlier.[446]

Only a relatively close reading of the agency's generally applicable procedural rules discloses the requisites for the filing of a petition for rulemaking. To the extent the petitioners are represented by persons who have considerable experience in dealing with the FERC and its regulations, this situation may not create problems for either the petitioners or the agency. One official who regularly handles these petitions indicated that he had not received any complaints regarding the regulations.[447] At the same time it is not inconceivable that persons lacking this experience may wish to petition the agency given the scope of FERC's regulatory authority. The lack of a clear reference to the procedures applicable to petitions for rulemaking may disadvantage them. While the agency informs persons who file documents regarding their noncompliance with applicable regulations,[448] it would certainly save everyone's time if the applicability of certain requirements was clear at the outset. In fact some of the petition format requirements should more appropriately be phrased as recommendations rather than requirements for the benefit of the unsophisticated.

Moreover, since the agency's general procedural rules are crafted with a view to covering a variety of different proceedings, it is not always clear how a particular requirement applies to petitions for rulemaking.[449] While this problem might be a minor one for experienced practitioners, it is likely to confuse those less sophisticated and at least provoke numerous questions that the agency's officials will have to answer.

The agency has regulations that specifically authorize the filing of petitions for the issuance of interpretative rules regarding any question arising under the National Gas Policy Act of 1978 or any rule promulgated thereunder[450] and for the institution of proceedings for the purpose of issuing statements, rules or regulations with regard to oil pipelines.[451] The existence of these, along with the absence of a clear general set of regulations dealing with the filing of rulemaking petitions, might create further confusion outside the energy bar by suggesting that the agency will consider only the types of petitions thus expressly referred to. If special procedures are required for particular types of rules,[452] a general set of petition regulations could so indicate while at the same time consolidating in one place the procedures generally applicable.

4. Federal Trade Commission (FTC)

The APA is the only statute applicable to the FTC which requires that it receive, consider and dispose of petitions for the issuance, amendment, or repeal of rules.[453] Anyone can file such a petition with the agency; it does not interpret the term "interested person" in Section 553(e) in a restrictive fashion.[454] Because the agency wants to encourage petitions from the public at large, its regulations pertaining to the filing and processing of petitions are relatively simple.[455] Their simplicity also gives the agency the flexibility of dealing with unforeseen situations where very formal and specific regulations might overly restrict its discretion.[456]

In fact the agency has several sets of petition regulations and the process of handling petitions varies in part because of certain statutory provisions. For simplicity each petition process will be described separately.

Proceedings to establish rules defining acts or practices which are unfair or deceptive, that is trade regulation rules,[457] may be commenced by the FTC pursuant to a written petition filed with the Secretary of the Commission.[458] No special form of petition is required,[459] though the petition must at the least state "reasonable grounds" for the request.[460] Occasionally, however, some petitioners think they have to comply in addition with the format requirements applicable to formal proceedings because of the way the latter regulations are written.[461]

Where it is not clear from the face of a document whether it is in fact a petition for rulemaking, the Secretary's office makes the determination following consultation with the person submitting the document and sometimes after discussing the matter with the staff of the agency.[462] Since most petitions for rulemaking received by the Commission also seek FTC administrative enforcement, some of the material in a submission may be exempt from public disclosure under the Commission's rules.[463] Otherwise once it is received the petition is put in a looseleaf binder in the public reference room after having been assigned a control number.[464] It is then referred to the Bureau of Consumer Protection for investigation and recommendation to the commissioners.[465]

The receipt of the petition is not noticed in the Federal Register[466] because at this early stage the focus in on the staff's making its own investigation regarding the merits of the petition.[467] Nevertheless at times interested persons file comments in response to the petition which are included in the non-public investigatory file and are considered by the staff in its decision-making.[468] The Commission's operating manual requires that the Bureau forward its recommendation for action on the petition to the commissioners within 90 days of receipt of a petition by the Bureau.[469] That staff manual includes the criteria to be considered in deciding whether to initiate a rulemaking proceeding, whether on the basis of a petition or on the agency's own initiative.[470]

The Commission maintains an automated management information system which includes the date of filing of the petition and other relevant dates such as the date on which the Bureau forwards its recommendation to the commissioners.[471] It is used by the Bureau to track petitions and other matters. History sheets are also maintained which list all documents that have been received relating to particular matters including petitions.[472] It is available for public inspection.[473] It is somewhat comparable to the FCC's docket history.[474] The Commission is in the process now of transferring it to a computer system.[475]

The authority to formally dispose of petitions has not been delegated to the Bureau as it has in some agencies such as the FCC.[476] Rather all formal dispositions are determined by the Commission.[477] This is due to the small size of the agency.[478]

Once the Bureau's recommendation is forwarded to the commissioners, there is no deadline for action and this has also provoked criticism.[479] However once a majority of the commissioners have voted on the recommendation one way or the other, there are deadlines for the remaining commissioners to act.[480]

Prior to publication of any notice of proposed rulemaking, the Commission is required by statute to publish an advance notice of proposed rulemaking in the Federal Register.[481] That notice must contain a brief description of the area of inquiry under consideration, the objectives which the Commission seeks to achieve, and possible regulatory alternatives under consideration as well as invite comments of interested persons.[482] Thus if the Commission decides not to deny a petition for rulemaking and to continue with its consideration of the petitioner's proposal, it must involve persons outside the agency in the process by the solicitation of their views. The issuance of the advance notice may mean no more than that the Commission finds the proposal may have some merit and it needs more information.[483] The notice, if issued, must be submitted to the Committee on Commerce, Science, and Transportation of the Senate and to the Committee on Interstate and Foreign Commerce of the House.[484] A copy of the notice is also sent to the petitioner.[485]

Following issuance of the advance notice, a rulemaking record is formally established and the submissions are categorized by type, such as consumer, business, etc.[486] This file is publicly available.[487] Apparently receipt of comments at this stage is common, certainly more so than prior to the issuance of this notice.[488] The time period for submitting comments is generally 60 days. The Commission entertains, though does not always grant, requests to extend the comment period.[489] After considering all information and comments received in response to the advance notice, the Bureau forwards its recommendation to the commissioners regarding whether or not to proceed with the rulemaking.[490] Apparently the 90 day time limit applicable to initial action on petitions does not apply at this stage.[491] A favorable decision means the issuance of an "initial" notice of proposed rulemaking[492] and later, if the proceeding is not earlier terminated, by a final notice of proposed rulemaking[493] and still later by the final rule.[494] The petitioner is required to be sent copies of the initial and final notices but apparently not the notice of adoption of the rule.[495] Parts of the file compiled as part of consideration of the petition initially may be included in the rulemaking file.[496]

Rather than proceeding with the issuance of an advance notice of proposed rulemaking, the Commission may deny a petition for rulemaking where it is not deemed "sufficient to warrant commencement of a rulemaking."[497] In that case the petitioner is notified by letter of the decision along with the reasons.[498] If an advance notice is issued but the proceeding is later terminated following either that notice, the initial notice of proposed rulemaking, or the final notice, the petitioner might be also informed.[499] Since, however, to date the FTC has generally gone on to a rulemaking following issuance of an advance notice, it is difficult to know for certain what approach the FTC would take in the case of a termination.[500] While the Commission has not formally considered the question, the agency's rules of practice suggest that a petition for rulemaking would be deemed to be granted when a final notice of proposed rule-making is issued.[501] It might, therefore, argue that a later withdrawal of the proposal does not constitute a denial of the petition since it has earlier concluded "the matter presented to it" within the meaning of APA Section 555(b).[502] Therefore APA Section 555(e) would not require a written notification of denial.[503] If it were deemed to have concluded the "matter presented to it" by issuing a notice of proposed rulemaking, the duty under Section 555(b) to act within a reasonable time[504] may not apply to require the agency to complete the rulemaking promptly.

Finally, the Commission has general authority to use mechanisms in addition to advance notice in soliciting suggestions regarding the subject matter of a petition.[505] Moreover, the Commission retains some discretion in individually tailoring the procedures following the commencement of a rulemaking proceeding.[506]

Decisions on petitions are expressly subject to reconsideration. If a denial occurs, the petitioner may be given the opportunity to submit additional data.[507] The agency is apparently under no obligation to grant requests for reconsideration.

The specific procedures mandated by statute for trade regulation rules do not apply to interpretative rules and general statements of policy with respect to unfair methods of competition[508] or unfair or deceptive acts or practices in or affecting commerce.[509] This means that there is no statutory duty to issue an advance notice of proposed rulemaking. Also the petition regulations applicable to trade regulation rules are inapplicable.[510]
However, except for the issuance of an advance notice of proposed rulemaking, such petitions are handled in about the same manner as petitions for trade regulation rulemaking.[511] The factors entering into staff consideration may, however, differ to some extent. The same is true with regard to petitions for the issuance of procedural rules.[513]

In addition to the petition regulations applicable to trade regulation rules, the FTC has two other sets of petition regulations. One covers petitions for substantive rulemaking under the authority of statutes other than that providing for the issuance of trade regulation rules.[514] This regulation is generally similar to that applicable to trade regulation rules.[515] It differs in certain ways, however. For instance there is no express requirement that the petition be in writing; notification of any denial must be given "promptly"; and the petitioner is apparently assured of the opportunity to submit additional data in the case of a denial.[516] It is unclear why these differences exist, but at any rate their effect in practice may be inconsequential.

While proliferation of largely identical sets of petition regulations would seem unnecessarily confusing in most instances, in the FTC case the existence of special statutory requirements, such as advance notice of proposed rulemaking might justify, on the basis of clarity of statement, this separate treatment of trade regulation petitions and petitions for other substantive rulemaking.[517] At the same time it is not clear why the promulgation of general statements of policy, rules of agency organization and procedure have been made expressly exempt from this second set of petition regulations[518] in view of the fact that the petition regulations applicable to non-trade regulation rules elaborate very little on the bare mandates of the APA.[519] General policy statements and rules of procedure are in fact subject to the APA right to petition.[520]

The second set of regulations applies to requests (not petitions so-called) for interpretations of the Fair Credit Reporting Act,[521] which interpretations appear to be interpretative rules within the meaning of the APA.[522] Here the FTC publishes Federal Register notice of the proposed interpretation and solicits comments on it.[523] No statute expressly mandates these procedures. In view of the existence of these regulations, it is curious that the agency has not adopted a set of regulations expressly applicable to interpretative rules generally or, if the treatment of petitions for interpretative rules, requires nothing different than the handling of petitions for non-trade regulation rulemaking, why it has not expressly covered them in the catch-all petition procedures described above.[525]

In sum where a statute or agency policy require substantially different treatment for different types of petitions, it makes sense to have more than one set of petition regulations but generally not otherwise.[526] Moreover, petition regulations should exist for all the types of rules which fall within Section 553(e) of the APA or other statutory petition provision and the extent of coverage of these regulations in terms of types of rules should be clear.

At least within the last five years, the FTC has not been swamped with petitions for rulemaking. Only nine have been filed.[527] Of those, five were denied, two were granted, and two were pending in July, 1986.[528] Disposition time from filing to final grant or denial has varied from less than one year to more than three years.[529] Why so few are filed is unclear, though it is possible that the current deregulation climate, along with prior congressional displeasure with Commission activity,[530] suggests to prospective petitioners that they will not have much success in having the agency act favorably on their petitions.

5. Department of Transportation: The National Highway Traffic Safety Administration (NHTSA)

Among the agencies whose petition practices were examined in depth, NHTSA's attempt to formalize the process by both regulation and internal staff directive is particularly remarkable. While the regulations themselves do not display kinship with the more adversary procedures of judicial practice (as is the case with the

FCC[531]), the express internal ordering of the petition process is detailed to the point of specifying who within the agency gets copies of the letters granting or denying petitions.[532] Apparently, however, the attempt to describe the flow of the decisionmaking process is typical of this agency even outside the petition area.[533] At the same time the processing of petitions, and engaging in rulemaking efforts when they are granted, may consume as much as fifty percent of the agency's resources.[534] As much as eighty percent of its rulemaking efforts can be traced in recent years to petitions.[535]

The existing formalized structure had its origins in 1977 during Joan Claybrook's tenure as Administrator.[536] It was further elaborated in 1983 when very detailed time deadlines for various stages of the decisionmaking process, along with specific tracking responsibilities, were added.[537] The statute providing for the establishment of motor vehicle safety standards[538] expressly authorizes petitions for rulemaking,[539] specifies procedures to be followed upon the filing of such petitions[540] and lays down a time deadline for action on petitions.[541] However the regulations elaborate to some degree on the statute and the internal orders go far beyond what the statute mandates.[542]

The statutory procedures for petitions are described in Appendix A to this report.[543] Turning to the agency's elaboration of them, its rules mandate the format of formal communications with the agency,[544] the address where they are to be submitted,[545] signature form,[546] and language used [English].[547] These general regulations apply to petitions,[548] though they are not expressly cross-referenced in the petition procedures.[549]

More detailed requirements applicable to form of submission are also contained in the petition regulations themselves.[550] They include requirements that a document intended as a petition for rulemaking be submitted to a designated address, be in English, carry a heading that includes the word "petition," set forth the facts establishing that the rule is necessary, give a brief description of the substance of the rule desired, and contain the name and address of the petitioner.[552] Except for failure to address the petition properly,[553] a document failing to conform to any of the requirements of the petition regulations (though not the more general agency regulations for form of documents) will not be treated as a petition but ordinary correspondence and any suggestions will be considered "at the discretion" of the agency.[553]

By agency order any petition received by a NHTSA official must be immediately forwarded to the Executive Secretariet for initial processing as controlled correspondence.[554] The Secretariet then directs the petition to the appropriate "office of primary responsibility" (OPR) for response and distributes copies to various agency officials. The Associate Administrator for Rulemaking is the designated OPR for petitions relating to motor vehicle standards.[555] If a petition is filed improperly or is incomplete, the Secretariet and petitioner (within 14 days) are notified by the OPR and the petition is removed from the correspondence control system.[556] If the petition later is amended so that it is complete, it is reentered into the system.[557] Once the petition is complete and in proper form, the statutory 120 day period for action on the petition starts to run.[558] The OPR sends a letter of acknowledgement to the submitter of a properly filed petition.[559] The petition is assigned a docket number and made publicly available in the docket section.[560]

The Associate Administrator for Rulemaking must classify petitions within 7 days of their receipt according to the complexity or difficulty of responding to them:

a. Class I includes relatively simple petitions to which the agency can respond by making minor amendments to a standard or regulation or by denying the petition without the need for much technical review.

b. Class II includes petitions of moderate difficulty which can be acted on by the adoption of a final rule in less than a year.

c. Class III petitions require substantial analysis, possibly some research and complex rulemaking.[561]

Once assigned, a classification can be changed. Strict timeframes apply to requesting and acting on a request for a modification.[562] Following receipt and classification of a petition, the Office of the Associate Administrator for Rulemaking commences a technical view of the petition.[563]

While the agency does not generally publish Federal Register notice of the receipt of a petition,[564] both regulated entities and public interest groups visit the docket room on a frequent basis to review recent filings.[565] Thus comments may be filed on the petition, they are included in the docket file[566] and are considered by the agency.[567] The reluctance to formally publish notice of receipt can be attributed to various factors. Merely putting the petitions on public display does at times solicit some input[568] without incurring substantial cost; there is an apparent general lack of interest in commenting even when a notice is published;[569] the agency usually feels competent to evaluate most petitions on its own;[570] and, finally, substantial additional time delay might be built into the decisionmaking process by a mandatory notice stage,[571] delay that can make meeting the statutory deadline or coming close even less a realistic possibility than it currently is.[572] As to the latter problem, any public notice must be prepared and cleared through the various levels in the bureaucracy; a thirty to sixty day comment period follows; and work on the proposal is likely to be suspended until all comments are in.[573] The agency also notes that if the petition is granted, there will be an opportunity to comment as part of the rulemaking, and if it is denied, interested persons can then file their own petitions.[574]

Nevertheless at times the agency has publicly solicited comments on a petition prior to grant or denial as a way to explore the issues raised when the agency feels it does not know enough about a proposal.[575] Moreover a public meeting can be held. If it is determined that such a meeting is desirable, a Federal Register notice of its time, place and subject matter and inviting public participation is published,[576] generally within four weeks of receipt of the petition.[577] At that meeting interested persons may submit their views and evidence through oral and written presentations, though there is no cross examination permitted.[578] A transcript of the meeting is kept.[579]

The technical review of the petition is required to be concluded within seventy-five days with an OPR draft evaluation which proposes a recommended decision, taking into consideration the merits of the petition, its implication for agency resource requirements and its compatibility with the existing rulemaking program.[580] If it is proposed that the petition be granted, the evaluation must include an estimate of agency resources necessary to carry out the rulemaking and a schedule for the rulemaking activity. This document is distributed to various offices within the agency for comment.[581] The OPR then reviews the internal comments, prepares a summary of them, revises the rulemaking schedule (if applicable) and then drafts a memorandum of proposed decision. All of these documents are sent to the Chief Counsel for preparation of a Decision Notice which is then sent to the OPR. After the documents and notice are circulated to appropriate offices for concurrence, the package is sent to the Administrator for approval.[582] The agency publishes notices of grant and denial in the Register as well as personally informs the petitioner in writing of the disposition of its petition.[583]

While the APA refers to petitions "for the issuance, amendment, or repeal of a rule," the National Traffic and Motor Vehicle Safety Act authorizes petitions "requesting [the Administrator] . . . to commence a proceeding respecting the issuance" of a motor vehicle safety standard.[584] If such a petition is granted, the agency "shall promptly commence the proceeding requested in the petition."[585] Thus unlike the APA, the grant of a petition technically occurs prior to the issuance of the final rule.[586] Nevertheless the agency has interpreted its obligation upon a grant to include at least issuance of an advance notice of proposed rulemaking or, more usually, a notice of proposed rulemaking.[587] The agency's rules expressly provide that a grant of the petition will follow upon a finding that "there is a reasonable possibility that the order requested in the petition will be issued at the conclusion of the appropriate proceeding."[588]

Given the fact that the grant or denial of a petition technically occurs under the statute prior to the commencement of a rulemaking, if the rule-making is later terminated or the rule adopted differs substantially from that requested by the petitioner, the agency has no duty under the National Traffic and Motor Vehicle Safety Act to publish a notice of a denial along with reasons[589] nor arguably are the requirements of APA Sections 555(b) or 555(e) applicable to the extent the grant and commencement of the rulemaking are considered the final disposition of the petition.[590] The NHTSA regulations in fact expressly note that the granting of a petition does not signify that the rule requested will be issued.[591]

The timing for issuance of a notice of proposed rule-making following a grant varies depending on the type of petition involved. With Class I petitions the agency's internal directives require the publication of the notice at the time of publication of the grant[592] and establish various other deadlines.[593] For Class II petitions, the agency must develop a rulemaking support paper within the first 120 days of receipt of the petition, draft a notice of proposed rulemaking for circulation to the Office of Management and Budget within 60 days of the grant, hopefully publish the notice a month later and, soon after the expiration of the comment period (60 days or so), promulgate a final rule.[594] For Class III petitions, there are no such specific timetables for start or completion of the rulemaking except, of course, that the grant must occur within 120 days of the receipt of the petition.[595]

The agency is under a statutory duty to either grant or deny a petition within 120 days of its filing.[596] If it denies the petition, the statute requires that it publish its reasons in the Federal Register.[597] The agency has elaborated on these requirements by providing that the petitioner must be notified in writing of a denial within the 120 day period[598] and the Federal Register notice of the denial must be issued within 45 days of the denial.[599]

At the time the grant or denial occurs, any materials that are specifically referenced in the grant or denial decision and that are not available elsewhere in the docket section are filed in the docket assigned to the petition. If the petition is granted, these materials become part of the record for the rulemaking that is initiated.[600] There is no regulation that deals with petitions for reconsideration of decisions on petitions,[601] though there is a prescribed procedure for petitioning for reconsideration of rules once adopted.[602]

The agency maintains a computerized tracking system which reflects the filing date of the petition, all relevant milestones in its processing, and its status at any point in time.[603] While the public does not have direct access to this system, the Office of the Associate Administrator for Rulemaking will supply information on the status of petitions on request.[604]

Agency officials are alerted by agency directive that on failure to meet a deadline the Administrator and the Office of Rulemaking must be advised in writing.[605] The Executive Secretary is required by order to provide a monthly report to the Administrator outlining the progress in meeting deadlines and highlighting delinquencies.[606] All associate administrators and staff office directors are directed to ensure that their performance standards and those of their subordinates responsible for processing petitions contain an element relating to timeliness in meeting the deadlines established.[607]

Despite the directives establishing deadlines for action, and the apparent threat of negative performance evaluation in case of unexcused delay, action on petitions rarely occurs on schedule,[608] and the statutory deadline is met only about five percent of the time.[609] One official suggested he thought the deadlines were unrealistic since they failed to take into account the need to resolve differences within the agency regarding issues raised.[610] Despite the apparent lack of strict enforcement of the deadlines from the top of the agency,[611] however, the timeframe for processing petitions has improved over the last several years.[612] For 1985 the average time for processing a petition was about eight months from its receipt to the publication of a grant or denial notice in the Register.[613]

In describing the flow of the decisionmaking within the agency, the internal directives do largely represent the actual workings of the petition process,[614] a flow that has seemingly been internalized by a senior staff that has worked together in the agency for quite a few years.[615] The orders serve the purpose of educating younger staffers with regard to the system.[616] In this way a detailed routine has been established and maintained and the processing of petitions may have been expedited thereby. Such a routine is particularly important given the extent of the agency time and resources spent on petitions. However, internal directives of the detailed type found in NHTSA might hinder rather than expedite the process where agency officials, for one reason or another, want to insist on exact compliance, though at this agency the long-term working relationships of the principal actors appears to have avoided this problem.[617]

Since 1981, between 20 and 25 petitions for rulemaking of various kinds, both for motor vehicle safety standards and others, have been filed each year.[618] Of these 45% have been granted and 55% have been denied.[619] As of June 5, 1986, 28 petitions were pending.[620] Vehicle and equipment manufactures submit approximately one-half of the petitions with trade associations, interest groups and private citizens accounting for the remainder.[621]

6. Nuclear Regulatory Commission (NRC)

As in the case of most of the other agencies whose petition practices were examined in some detail, the NRC is not subject to any statute other than the APA that requires it receive, consider, and dispose of petitions for rulemaking.[622] Its process is outlined by rule[623] and by directives of the Executive Director for Operations.[624] An internal staff manual represents guidance for implementing the process.[625] With the exception of procedures involving the National Environmental Policy Act,[625a] the regulations applicable to the general petition process are largely contained in one subpart of the Code of Federal Regulations[626] and, therefore, prospective petitioners do not usually have to search elsewhere in order to discover what is required of them.[627]

Petitioners are encouraged to confer with the staff of the agency prior to the filing of a petition for rulemaking.[628] Where the agency is currently taking action that may obviate the need for filing the petition or the agency will need certain specific information in order to evaluate the merits of the petition, taking advantage of this opportunity may save both the petitioner and the agency a great deal of time. A memorandum summarizing the substance of any meeting held is included in the official file on the petition.[629]

Petitions should be addressed to the Secretary of the Commission[630] but if any other NRC employee receives a document which appears to be a petition for rulemaking, he or she must forward the document to the Docketing and Service Branch of the Office of the Secretary.[631]

In order to qualify as a petition, a document must set forth a general solution to the problem identified by the petitioner or the substance or text of a proposed rule, state the petitioner's interest in the action requested, and include a statement in support of the petition indicating the issues involved, arguments with respect to those and relevant technical, scientific or other data.[632]

The NRC is one of the few agencies that has adopted regulations applicable to the petition process that relate to the responsibilities of the agency under the National Environmental Policy Act.[633] In some cases the agency may require the petitioner to submit such information as may be useful in aiding the agency in complying with NEPA in its action on the petition.[634] The format of the environmental report required is described in the regulations.[635] If a draft NEPA statement is prepared, it is made available to the petitioner and so is the final NEPA statement.[636] The impact statement accompanies the petition and may be considered in the agency's decisionmaking process.[637] These regulations are not, but should be, cross-referenced in the petition regulations so that prospective petitioners can more easily identify their obligations and rights.

Upon receipt in the Secretary's Office of a document that may qualify as a petition for rulemaking, that office logs in the document, establishes a docket control number, and sends a copy to the Division of Rules and Records of the Office of Administration where it is determined whether or not the document meets the threshold requirements for a petition for rulemaking.[638] If it appears not to meet them, DRR drafts a memorandum to the Executive Director for Operations indicating its finding along with a draft letter to the petitioner pointing out the aspects in which the petition is deficient.[639] The Executive Director makes the formal determination that the document fails to satisfy the requirements for a petition for rulemaking.[640] This should be done ordinarily within 30 days of the receipt of the petition by the Secretary's office.[641] A letter is then dispatched to the petitioner[642] who can submit additional information to correct the deficiencies.[643] If the petitioner does not correct the deficiency within 90 days from the date of notification by the EDO, the petition may be returned to the petitioner without prejudice to its right to file a new petition.[644] The Commissioners are sent copies of any letter to a petitioner indicating that a petition is deficient or which returns a petition because it is incomplete.[645]

If a document meets the requirements for a petition for rulemaking, DRR assigns a docket number to the petition and forwards a copy of the petition to the appropriate office.[646] The DRR also has the responsibility to see that the petition is formally docketed and a copy deposited in the Commission's Public Document Room.[647]

At this point a determination is made whether the petition should be processed routinely or handled as a so-called "fast-track" petition. Classification determines whether the petition will be published initially as a notice of proposed rulemaking ["fast-track"] or whether the additional step of publishing notice of receipt of the petition to solicit comments will be taken.[648] The purpose of this system is obviously to expedite the processing of certain petitions where they appear to be clearly meritorious.[649] The staff office to which a petition has been assigned identifies a contact person to handle the petition and make the "fast-track determination" within 10 working days.[650]

The staff handbook identifies the types of petitions that are eligible (though not necessarily handled) as "fast-track" petitions. These include requests for interpretative rules, rules of agency organization, procedure and practice, and rules for the orderly conduct of Commission business;[651] proposed amendments to commission rules that are "corrective or of a minor or nonpolicy nature"; rules that propose actions involving a minor safety, safeguards or environmental issue, an increase in NRC efficiency, or a reduction in the regulatory burden on licensees; proposals of action already under consideration in an ongoing rulemaking; or proposals that are "clearly meritorious and will not adversely affect the rights of other licensees or persons."[652] At the same time the handbook specifies that "fast-track" processing is not generally appropriate with regard to petitions that require preparation of an Environmental Impact Statement or those seeking rules that would impose new or increased reporting, application or recordkeeping requirements subject to clearance by OMB, or would have significant economic impact on a substantial number of small entities or have a significant impact on NRC staff and resource commitments.[653] Moreover, the agency does not process denials of petitions on the "fast-track."[654]

If the staff office determines that "fast-track" processing is appropriate, it informs DRR of this decision and develops a notice of proposed rulemaking that addresses the issues in the petition.[655] Such a notice must be developed for transmittal to the Executive Director of the Commission for approval within 90 days after DRR assigns a docket number.[656] At the conclusion of the comment period, the contact person in the assigned office sends a letter to the petitioner enclosing copies of any comments that were received in response to the proposed rule. This letter also indicates the initial target date for completion of staff review of the comments received and development of a final rule. The assigned office is responsible for notifying the petitioner of any subsequent changes in the target date or of the contact person to whom the petition is assigned.[657]

The "fast-track" procedure has been utilized only infrequently.[658] Apparently few petitions filed since these procedures went into effect met the eligibility standards.[659] Whether bureaucratic caution was also in part responsible for classification decisions in some cases is not clear.

If the office to which the petition has been assigned determines that a petition for rulemaking is not suitable for "fast-track" processing, then DRR is informed of this decision. The staff office concurs or provides comment on the draft notice of receipt of a petition for rulemaking which is prepared by DRR for Federal Register publication.[660] This notice of receipt describes the contents of the petition and allows at least 60 days for public comment.[661] While the agency's regulations do not expressly indicate it,[662] publication of a notice of receipt is routinely done in the case of petitions not put on the "fast-track."[663] This means that even if a petition is likely to be denied, a comment period will almost invariably precede its disposition.[664]

As part of the processing of non-fast-track petitions, the assigned office must establish a schedule and target date for completion of staff action on the petition.[665] The Commission in 1977 indicated that it believed that the time for response to the petition, that is the denial or issuance of a notice of proposed rulemaking, should "seldom exceed 6 months for minor petitions or 12 months for major ones."[666] The agency has not, however, been able to meet their schedule in the recent past.[667]

Following the comment period specified in the Federal Register notice of receipt of a petition, the DRR sends a letter to the petitioner enclosing copies of any comments received and indicating the initial target date for completing staff review of the petition and the name and telephone number of the contact person responsible for the petition. The assigned office is responsible for notifying the petitioner of any subsequent changes in the target date or of the contact person.[668]

In view of the time it may take to respond to a petition for rulemaking following its receipt, the contact person is responsible for giving the petitioner a status report on the petition every three months,[669] though in practice communication may occur less frequently.[670] Not only can this report assist in reducing what may be the petitioner's impatience with any perceived delay, but this periodic contact is a means to discover whether the petitioner is changing its position on a particular issue related to the petition or believes that its concerns have been satisfied by other actions occurring subsequent to the filing of the petition.[671] Such contact may thus result in withdrawal of a petition and save agency resources. Copies of all correspondence sent to a petitioner must be forwarded to DRR and the official docket file which is maintained by the Office of the Secretary.[672]

Action on a petition for rulemaking is considered complete when the petition has been withdrawn, denied or granted.[673] Only the petitioner may withdraw a petition, an action which is noted in the Federal Register.[674] For "fast-track" petitions a denial may occur after the issuance of a notice of proposed rulemaking and involve the termination of that rulemaking without the issuance of a final rule. For others, a denial may occur after the issuance of the notice of receipt of a petition. NRC petitions often involve many complex technical issues. Each issue may be handled differently, one aspect of a request may be withdrawn, one denied, and several others addressed in rulemakings, ongoing or otherwise. Action on the petition would not be deemed completed until all issues have been finally disposed of.[675]

If a petition is denied, a notice of denial is published and the petitioner is informed in writing of the reasons.[676] The Executive Director has been delegated authority to deny those petitions for rulemaking of a "minor or nonpolicy nature where the grounds for denial do not substantially modify existing precedent."[677] The notice of denial includes a summary of each of the issues raised in the petition, a summary and analysis of public comments received on the petition, the agency's response to each of the issues raised and the reasons for denying the petition.[678]

Like the FERC,[679] the NRC has until recently interpreted Section 553(e) of the APA to suggest that a grant of a petition for rulemaking does not occur until a rule conforming to the petitioner's request has been finally issued,[680] not simply proposed as a rule as is the case with some agencies.[681] This means, among other things, that if the final rule which is adopted does not comply with the petitioner's initial request, there is a denial at least in part and the agency must issue an explanation for the denial because of Section 555(e).[682] This is true with regard to "fast-track" and other petitions. As was indicated at the outset of this report,[683] this interpretation of the APA is the appropriate one to adopt. However, the NRC is currently reconsidering its position on this matter,[684] perhaps in part because this interpretation makes it look particularly slow in finally disposing of petitions. Unless it earlier denies a petition, it must complete the rulemaking before it can claim that the matter has been finally resolved. Given the nature of the issues which have been presented to the NRC over the last decade or so, as well as intervening legislative and regulatory developments, completion of a rulemaking in short order has not proven feasible in many instances. For petitions received since 1980 for which action has been completed, the average elapsed time for processing a petition from its filing to its final grant or denial has been 22½ months.[685]

If the NRC changes its interpretation of the APA, it will mean that with regard to "fast-track" petitions, the grant will presumably be considered to occur relatively soon after the receipt of the petition, with or before the issuance of the notice of proposed rulemaking. As to the remainder of the petitions, the grant would presumably also occur no later than the issuance of the notice of proposed rulemaking. However, improving statistics would not appear to be an adequate justification, by itself, for rejection of what is the most appropriate interpretation of the APA.

If the agency were willing to dispense with its apparently standard practice of publishing notice of receipt of petitions for comment where the chances of the agency's formally including the proposal in a notice of proposed rulemaking or final rule are not very good, statistics for denials would be improved without violating the APA. Perhaps, however, the agency believes that publication for comment is sufficiently likely to elicit valuable information or at least protect or improve its public image so that the changes in its current publication practice would be unwise, at least at this time.

Delay in disposing of petitions for rulemaking is not a new issue for the Commission. During 1977 the agency spent a considerable amount of time in self-study in order to determine how to expedite the processing of petitions, the nature of which had changed from requests for a general license or licensing exemptions and minor procedural amendments to matters involving significant policy and safety matters.[686] At that time it was estimated that the typical petition required 70 weeks for a denial and 137 weeks for a rulemaking.[687]

During the course of the NRC's self-examination, several proposals were made by the staff which appear to have some potential in improving processing time not only in the NRC but other agencies:

a. Delegation from the top of various types of decisions on petitions.[688] Ultimately the Commission delegated to the Executive Director the authority to deny petitions of a minor or nonpolicy nature.[689] Given the duties of the typical head administrator of an agency, waiting for his or her approval to rather routine matters can introduce considerable delay as well as waste his or her time.

b. Requiring the petitioner in its initial submission to supply as much relevant information as possible.[690] This reduces the drain on agency resources to the extent the staff attempts on its own to discover pertinent data and arguments. Even if the agency does not take on that responsibility, such a requirement may obviate, to some extent, the need for the staff to contact the petitioner to obtain further documentation for the request.

The clearer the agency is in the regulations regarding the type(s) of issue(s) that need(s) to be addressed and/or the type of information required for a decision on a petition, the less the need for petitioner inquiries to the staff and the faster the staff can complete at least the early stages of considering a petition on the merits. Where a statute conditions the issuance of a regulation on certain specific findings, it will obviously be easier to delineate the agency's needs. Not only are clear regulations important but the expressed willingness of the agency to meet with the petitioner before a petition is filed can potentially save everyone's time in avoiding misunderstandings.

c. Involvement of persons with ultimate decisionmaking authority as early in the process of considering a petition as possible.[691] If the proposal will ultimately be rejected at the top for policy or other reasons, the earlier this is known the better in order to eliminate unnecessary staff work.

d. Streamling the decisionmaking process.[692] Delay in disposition of petitions may be due to unduly long comment periods, requiring or permitting repetitive review of decisional documents by the same office where not necessary or allowing sequential review of matters where simultaneous review would work just as well.

e. Assign petitions higher priority.[693] As indicated before[694] the APA assigns some priority to the consideration and disposition of petitions without directing that internally set agendas be disregarded. Where an agency believes it can benefit from the petition process, assigning a high priority is obviously more likely to be forthcoming. Where it has many matters on its agenda, petitions may appear as unwelcome distractions. For priority to be given requires some form of statement from the top that indicates that the petition process is important. Such a statement can be made in a variety of ways, including the mere presence of a regulation or internal directive dealing with petitions, making disposition of petitions a formal objective of the management system and holding persons accountable for their failure to meet assigned goals.

Improvement along these lines may reduce delay. But of course there is no assurance that the progress in this regard will satisfy either the public or the agency itself. While in 1977 the NRC attempted to expedite its handling of petitions, it has not satisfied itself that the situation cannot be improved further. During 1986 it has been again evaluating what can be done to shorten the time required for disposition of petitions for rulemaking.[695] In August 1986, the Executive Director for Operations advised staff responsible for handling petitions that all pending petitions should be "resolved" within 12 months and that action on petitions filed in the future (either denial or issuance of a Federal Register notice indicating the intention to grant the petition) should similarly take no more than 12 months.[696] If the staff believes a rule should be issued in response to a petition, the final rule should be promulgated not later than three years of the petition filing.[696a] The status of each petition must be reported to the Division of Rules and Records on a quarterly basis[696b] and schedules for resolution are to be published in NRC's quarterly regulatory agenda.[696c] Proposed extension of the resolution date must be approved in advance by the EDO who is to review proposed extensions and the reasons therefor on a quarterly basis.[696d]

The "fast-track" system itself is a recognition by the Commission that it can responsibly in some instances proceed directly to the issuance of at least a notice of proposed rulemaking without a preliminary stage for solicitation of comments. Provision for summary denial in some cases may be equally appropriate and likely to save time and resources.[697]

The NRC frequently incorporates petitions or parts of them into an ongoing rulemaking where similar or related issues are presented. Such incorporation is allegedly not permitted where it would unduly delay completion of the pending rulemaking or final action on the petitioner's request or would prelude adequate consideration of the matters raised in the petition.[698] The NRC's incorporation practice is not uncommon among federal agencies surveyed. However the statistics regarding time of disposition of NRC petitions[699] may in fact reflect delays incident to such incorporation.

Even where such incorporation occurs, however, the NRC recognizes that the petition does not lose its identity as a discrete matter calling for some final disposition, either withdrawal or express denial or grant.[700] On the other hand, where an agency sees the final disposition of a petition as occurring upon the issuance of a notice or advance notice of proposed rulemaking, such incorporation arguably does in fact complete action on the petition.

Once a final decision on a petition has been made by the NRC, the regulations do not expressly provide for petitions to reconsider the decision nor do they apparently provide for petitions for reconsideration of rules finally adopted.[701] Therefore the administrative remedy to correct alleged errors or to bring new information to the agency's attention is a petition for rulemaking.[702] This may not be the optimal procedure in all instances to the extent that the petition procedures mandate certain steps be taken by the petitioner or the agency that are unnecessarily burdensome at the reconsideration stage, for example a mandatory requirement for publication in the Federal Register of the receipt of a petition.

The Office of the Secretary of the Commission maintains the official docket file on petitions for rulemaking. Copies of all petition-related documents are required to be sent for inclusion in the official docket.[703] The office assigned the initial responsibility for considering the merits of a petition is also directed to send a copy of these documents to the DRR so that that office can monitor the current status of each ongoing action.[704]

When the petition results in a proposed or final rulemaking, the petition record, which includes the petition, relevant Federal Register notices, comments, and correspondence with the petitioner, become part of the regulatory history file whose collection is mandated by the recently adopted NRC regulatory history procedures.[705] The objective of the regulatory history of each rulemaking is to ensure that all documents of central relevance to a particular rulemaking are identified and accessible,[706] both for the purposes of interpretation of the rule[707] and judicial review.[708] An index of this file is prepared.[709]

The DRR currently maintains an historical log of all petitions filed with the NRC since 1961, which lists the "prm" (docket) number, name of petitioner, the date the petition was received, the date and citation to the Federal Register notice of receipt, the disposition, and the date and citation to the Federal Register notice of disposition.[710] On a quarterly basis the agency publishes an agenda document[711] which lists the petitions incorporated into final rules, petitions denied, petitions incorporated into proposed rules, petitions pending staff review, and petitions with deferred action. For each petition, it lists the docket number, name of petitioner, the part of the regulations affected, pertinent federal register citations, subject, summary of the petition and its objective, brief history of the agency's action in response to the petition, a timetable for any future action, and the name and address of the agency contact person. This agenda is rapidly becoming the principal tracking document in the agency.[712]

Compared to some other agencies, the volume of the NRC's petition business is modest. During the years 1980 to 1985 and the first half of 1986, the Commission received 6, 9, 8, 7, 4, 6, and 1 petitions respectively.[713] As of the end of June 1986, it had 36 petitions pending.[714] That number included 16 petitions received by the agency prior to 1980.[715] Of the petitions received since 1980, the agency has granted 7 at least in part, denied 11 at least in part, and four have been withdrawn by the petitioner.[716] In terms of the nature of the petitioners, industry (that is, licencees) have filed 15 of the 41 petitions presented since 1980, environmental and other public interest groups 9, private citizens 7, the federal government 1, trade associations 2 and state government 1.[717]

7. Environmental Protection Agency (EPA)

Since its organization in 1970 and extending to the present time, the EPA has been almost continuously faced with the challenge of elaborating the major components of the regulatory programs for which it has been responsible, first air and then a major restructuring of water pollution control and now hazardous waste. Those attempts at translating the broad outlines of congressional programs into specific operating controls has confronted the agency with major issues of public policy that have provoked a substantial amount of litigation. Issues have been resolved by judicial degree or settlement agreements arrived at between the agency and other parties to the litigation and not generally by means of petitions for rulemaking.[718] As a general rule in fact it might be expected that the petition process is more likely to be important in contributing to the evolution of regulatory programs only when the basic outlines of those are largely in place.

Given its preoccupation with major issues of policy-making and implementation, the development of regulations under APA Section 553 and certain other statutes providing for petitions for rulemaking have not apparently been considered a matter of high priority. The lack of petition filings in many areas has no doubt also contributed to a perception that ad hoc treatment of petitions when they are filed is the optimal way to deal with them.[720] The result is that written description or prescription of the petition process, whether by rule, internal staff directive or otherwise is absent with respect to many of the programs within EPA's jurisdiction. Agency officials interviewed claimed that the lack of regulations had not been the source of complaint or problems.[721]

What follows is a discussion of the petition practice in the area of toxic substances, hazardous waste, and air and water pollution. It does not include petitions received under the Federal Insecticide, Fungicide and Rodenticide Act[722] for reclassification of pesticides from restricted to general use[723] or petitions for establishing tolerances for pesticide residues in food and feed.[724] The agency receives an average of one hundred of the latter each year.[725] While rulemaking within the meaning of the APA is involved in these cases, it is rulemaking usually at the request of the registrant of the pesticide and not the public generally. Moreover the applicable procedures tend to be either of such specialized nature that generalization for the purpose of application in the case of other types of substantive regulatory programs appears unlikely[726] or the applicable statutory procedures do not differ significantly from other areas covered by this study.[727]

The special statutory petition procedures applicable under the Toxic Substances Control Act[728] are described in Appendix A to this report.[729] Briefly, any person can petition the Administrator "to commence" a rulemaking; the petition must set forth its basis; the agency may hold a hearing or other proceeding to consider the petition; within 90 days of filing of the petition, the agency must either grant or deny it; if the Administrator grants it, the agency must "promptly commence an appropriate proceeding"; if he denies it, the reasons for the action must be published in the Federal Register; judicial review of denials and inaction on petitions is expressly authorized.[730]

There are no agency procedural rules either reiterating these statutory procedures or elaborating on them.[731] One agency official indicated that the presence of the statutory procedures obviated the need for regulations.[732] In November 1985, however, the agency published in the Federal Register a statement to assist prospective petitioners in preparing their submissions.[733] Guidance was deemed necessary in order to assist petitioners in presenting the information required in order to obtain favorable action on their petitions and for the purpose of expediting agency consideration of and response to petitions.[734] Given the type of findings and judgments necessary to justify adoption or amendment of the rules under the Act,[735] it was deemed both desirable and feasible to be very specific regarding the type of technical and other data required to be included in a petition.[736]

The guidance informed the petitioners that their submissions should include their names, addresses, phone numbers, whom to contact for further information, the purpose of any organizational petitioner and a precise description of the relief requested.[737] As in the case of the NRC,[738] petitioners were also encouraged to confer with the EPA before filing a petition.[739] This would enable the petitioners to determine what information the agency already had on the matters at issue, what action it had taken or was currently taking, what information the agency needed to make its decision and what alternatives to federal regulation might exist.[740]

Apparently EPA receives an average of approximately three petitions each year under TSCA. Twenty-eight have been filed since 1978. Eight of those have been granted in whole or in part and 18 have been denied. Two are pending.[741] The experience in processing these petitions, and in particular two involving "multimedia" pollution problems, suggested to the agency the desirability of guidance to prospective petitioners.[742]

Receipt of a TSCA petition is not routinely (if at all) published in the Federal Register for the purpose of soliciting comments, though it is put in a docket room where it is publicly available for inspection.[743] However, public meetings may and sometimes have been held on petitions.[744] Comments are received and these are put into the public file.[745] Following receipt and assignment of a docket number,[746] the flow of the decision-making process apparently does not differ substantially from the situation where the proposal is agency-initiated.[747] The agency must within 90 days either deny or grant the petition.[748] The agency indicates that it meets this deadline in most cases.[749] Agency practice is to personally notify the petitioner in the case of a denial[750] as well as publish the denial along with the explanation in the Register as required by the statute.

It is important to note, however, that the petition provision of TSCA is different from APA Section 553(e) in one crucial respect of relevance to deadlines for agency action. Under TSCA the grant occurs prior to the formal commencement of the rulemaking. The statute refers to petitions to the agency "to initiate a proceeding"[751] and, therefore, the grant of the petition is not coincident with the issuance of a final rule as should be the case where APA petitions are involved.[752]

Once the agency grants a TSCA petition it must "promptly" commence the rulemaking[753] by, for example, issuance of a notice of proposed rulemaking or perhaps an advance notice of proposed rulemaking. However at this point no time limits under TSCA, and arguably not even those of Section 555(b) ("a reasonable time"),[754] apply to completion of the rulemaking by either withdrawal of the notice or adoption of the final rule.[755] Moreover in the case of a termination of the rulemaking without issuance of a rule or the adoption of a rule that differs substantially from that requested by the petitioner, there is arguably no statutory obligation to explain the denial to the petitioner personally,[756] though such an explanation may be demanded by the courts where judicial review occurs.

With regard to the record for decision on a TSCA petition, it includes all documents relied upon by the agency in making its decision to grant or deny the petition. If a rulemaking proceeding is commenced, the petition file becomes part of the record for that rulemaking.[757]

Under the Resource Conservation and Recovery Act,[758] any person may petition EPA for the promulgation, amendment or repeal of any regulation authorized by the statute; within a reasonable time following receipt, the agency must "take action" with respect to such petition and publish notice of that action in the Federal Register along with the reasons.[759] Like APA Section 553(e) and unlike TSCA, the statute talks of petitions for the issuance of rules, not for the commencement of proceedings for the issuance of rules, suggesting that a final affirmative disposition does not occur until the formal adoption of a rule conforming to the petitioner's request. Moreover, as in the case of the APA, disposition of the petition is subject to a requirement that it occur within a reasonable time.

However some confusion regarding EPA's obligations under RCRA is introduced by the fact that the agency is merely directed to "take action with respect to such petition," and it is not clear what qualifies as "action" within the meaning of this provision. It might be argued that sending a friendly letter of acknowledgement of a petition and thanking the petitioner for a good idea is an acceptable final disposition.

However, the agency appears to have construed RCRA in a fashion similar to the interpretation proposed in this report for APA Section 553(e).[760] That is to say, final affirmative action on the petition is the issuance of a rule. This agency interpretation has not been made explicit but can be derived from the regulations which the agency has adopted to implement the petition provision of RCRA.[761] It is not clear, however, how much thought the agency has given to this matter since apparently the relevant part of those regulations was developed as part of a vastly broader rulemaking in response to a court order and under strict time deadlines.[762]

Turning to those rules, there are some very specialized ones applicable to certain types of rulemaking; the purpose of these regulations is predominantly to specify the type of information and showings required from the petitioner for favorable action.[763] In fact a large portion of the petitions for rulemaking filed with EPA each year (over 100) are processed under these provisions.[764]

These rules are supplemented by a general set which applies also to petitions not falling within those special categories.[765] By its terms, however, this set is limited to regulations contained in certain parts of the Code of Federal Regulations.[766] Each petition must be submitted to the Administrator (no address specified) by certified mail and must include the petitioner's name and address, a statement of the petitioner's interest in the proposed action, a description of the proposed action including suggested regulatory language, and a statement of the need and justification for the proposed action including any supporting tests, studies and other information.[767] Upon receipt a petition is generally placed in the RCRA public docket.[768] The agency then makes a "tentative decision" to grant or deny the petition.[769] An affirmative tentative decision is published as an advance notice of proposed rulemaking or even a proposed rule. A negative one is published in the Federal Register as a tentative denial. In both instances written comments from the public are solicited.[770] A hearing to receive oral comments may be held on the initiative of the agency or in response to a written request from interested persons.[771] Following evaluation of all public comments, the Administrator makes "a final decision by publishing in the Federal Register a regulatory amendment or a denial of the petition."[772] It is this final provision in context that suggests that final affirmative action on the petition within the meaning of the petition provision of RCRA is deemed to be a grant that adopts the proposed rule.

The agency is currently engaged in putting large parts of the regulatory scheme under RCRA into place and, therefore, currently has rulemakings underway on numerous fronts. Therefore, to date, it has been possible to incorporate petitions relating to general policy matters into ongoing rulemakings.[773]

The principal statute relating to petitions for rulemaking that applies to EPA outside of the special statutory provisions just described is the Administrative Procedure Act. The agency has no set of implementing regulations or internal operating directives that apply expressly to this petition process.[774] This means, among other things, that petitions submitted which relate to most of the agency's duties and powers under the Clean Air Act,[775] the Clean Water Act,[776] and the Safe Drinking Water Act,[777] are handled purely on an ad hoc basis,[778] which practice has, according to the agency, "worked acceptably well."[779] No complaints regarding the lack of implementing regulations have allegedly been received.[780]

The agency estimates that during the past three years, it has received eight petitions in all under the Clean Water Act and Safe Drinking Water Act.[781] It has granted none of these: one was denied, three are pending, and the rest have been withdrawn or were "superseded" by events such as litigation.[782] For some unknown reason, the agency does not apparently consider requests to revise state implementation plans under the Clean Air Act to be "public petitions for rulemaking,"[783] though it would seem to be clear that federal approval or promulgation of such plans, or parts thereof, is rulemaking within the meaning of the APA.[784] One petition under the Clean Air Act has been filed in the last several years.[785]

Apparently there is usually no formal docket established for APA petitions for rulemaking.[786] An informal record of documents that supports the agency's decision on a petition may be maintained in the affected program office and is generally comprised of technical materials and agency pronouncements of relevance.[787] If a petition is not denied and a rulemaking is commenced, the petition file becomes part of the rulemaking record.[788] The agency does not apparently maintain a publicly available index of pending and disposed petitions.[789] Nor does the agency appear to have a formal tracking system that applies specifically to petitions.[790] Apparently there is no routine of public notification of the filing of petitions for the purpose of soliciting comments from interested persons except where a petition may have national significance.[790a] In terms of notice of grant or denial of an APA petition, the agency may write a letter to the petitioner and other interested persons and, in appropriate cases, publish a notice of the action in the Federal Register.[791]

Putting aside delay in final disposition of matters, a problem that afflicts agencies with or without elaborate regulations and internal directives and deadlines for disposing of petitions, interviews with agency personnel did not disclose any criticism of EPA for its lack of procedural elaboration in the petition area and pinpointed no specific problems that have arisen from the lack of such regulations.

One agency official expressed the opinion that persons who are relatively "sophisticated" legally or otherwise do not need regulations in order to formulate and submit petitions for rulemaking; that the "unsophisticated" would probably not read any regulations even if they existed.[792] For example, persons having some knowledge about the workings of the EPA would address a petition to either the Administrator or the appropriate program office and may have no need for a regulation specifying the street address of EPA headquarters in Washington. Aunt Millie in Kalamazoo might send her petition to the wrong agency official even if there were such a regulation on the books. This reaction overlooks, however, those persons and organizations that need, are willing to, and expect to look for guidance where it is generally provided, that is in the statutes, the Federal Register and the Code of Federal Regulations.

With regard to TSCA, the EPA could perhaps rely on the statute to give some guidance[793] and perhaps assume that those persons who would not look there would probably not look at the CFR. At the same time it felt the need to elaborate on TSCA's provisions through a guidance paper published in the Federal Register.[794] Moreover, in the case of RCRA which gives no more help than the APA[795] to the prospective petitioner in terms of explaining what is necessary to qualify as a petition and how the agency must respond to a petition, EPA did adopt a set of implementing rules while it continues to eschew development of similar ones for APA petitions. While the general RCRA petition regulations may have been developed largely as an adjunct to the more specific petition regulations,[796] it is worth noting that it made this effort at the same time that more substantial issues relating to the regulatory program demanded its attention. This should be contrasted with the fact that, while the air and water programs have hardly entered a quiescent stage, the basic outlines of the regulatory schemes there are largely in place and yet no petition regulations have been adopted.

V.

Judicial Review of the Petition Process

A comprehensive exploration of the issues related to judicial review of agency action on petitions for rule-making is neither possible here nor necessary for purposes of this study which is primarily directed at recommendations for improving the current handling of petitions by the agencies themselves. Nevertheless, an examination of the current state of the case law in this area is important background for any recommendations that might be made.

A. Standing

Under the APA "any interested person"[797] and under certain other statutes "any" person[798] may petition for rulemaking. Section 553(e) is not generally interpreted by the agencies to impose significant restrictions on who may invoke it.[799] In most instances, it is denial of petitions (or inaction thereon) that provokes attempts to obtain judicial relief of one sort or another. Such denials may "injure" the petitioner directly or indirectly in very tangible ways or merely disappoint a petitioner having only an "academic" or "organizational" interest in the regulatory change proposed. The discretion of the agency to grant or deny the petition may be narrowly cabined by statute or otherwise or practically unfettered. Any tangible benefit accruing to the petitioner is generally not a matter of legal "right." In fact in many cases any concrete injury might just as appropriately be seen as attributable to the action of the person regulation of whose activities is sought, rather than agency action.[800]

With regard to agency action on petitions for rulemaking submitted under the APA, the courts to date have inquired whether the petitioner seeking non-statutory[801] judicial review had standing under the traditional test of injury in fact traceable to the action challenged, remediable by the courts and within the zone of statutory protection.[802] In the case of, for example, the Toxic Substances Control Act, the right to petition is given to "any person"[803] and the right to judicial review of a denial[804] appears to be as expansive,[805] suggesting that Congress may have attempted to confer standing on even those only "abstractly interested." More precisely, TSCA may be seen as creating a legal right, "the invasion of which creates standing even though no injury would exist without the statute."[806]

B. Forum

Obviously where a statute specifies the court in which judicial review of agency action[807]--or inaction[808]--on a petition is to take place, its mandates control. A denial of a petition on its merits may not occur until a final rule is issued which differs from the one proposed by the petitioner.[809] In this circumstance if there is a forum designated by statute for review of the adoption of a final rule, this court is presumably the one authorized to review the "denial" of the petition. Of course it is always possible that an agency considers the final rule to be a "grant" of the petition while the petitioner believes that its request has not in fact been substantially complied with. Such disputes are presumably within the cognizance of any court authorized to hear appeals from the adoption of final rules.

In those instances where Congress has not expressly addressed the issue of the forum for judicial review, review of agency action or inaction with regard to a petition will usually take place in the district courts in a so-called non-statutory review proceeding.[810] In a significant recent case, however, the Court of Appeals for the District of Columbia indicated that where a statute committed final agency action to review by a court of appeals, the appellate court had exclusive jurisdiction to hear suits seeking interlocutory relief that might affect its future statutory power of review.[811] In this case undue delay was alleged and was said to qualify for court of appeals interlocutory review as a general matter.[812]

C. Timing

Determining when to intervene to review agency action pursuant to specific statutory review authority or in non-statutory actions is a task whose resolution requires a delicate balancing of numerous factors. Ascertaining when a "denial" of a petition for rule-making is final for purposes of review is not unique in this regard. Obviously if an agency has unequivocally rejected all of a petitioners' proposal and has stated its intent not to proceed further, agency action is as ripe for review as it can be. At the other extreme an agency may initially react negatively to some of petitioner's suggestions but at the same time issue a notice of proposed rule-making modelled verbatim on others and announce its willingness to consider comments regarding the advisability of pursuing the remainder of the petitioner's request. Here the court should stay its hand. Other cases are not so clear cut. The variations are so numerous and the balancing so context specific and necessarily subtle that statement of more than general guidelines is impossible. Those the case law has laid down in other areas[813] are largely applicable in the petition context.[814]

D. Preclusion

The federal courts have increasingly since the 1970's been confronted with challenges to agency denials of petitions for rule-making as well as to inaction on such petitions.[815] They have reviewed their legality despite contentions that the agency action at issue was so far committed to agency discretion by law as to be unreviewable under APA Section 701(a)(2).[816] They have even done so in non-statutory review proceedings[817] in the face of the existence of statutes expressly authorizing judicial review of agency action on certain types of petitions not before them.[118] Obviously the hoary common law maxim, "expressio unius est exclusio alterius," has not had much influence here,[819] though in some instances, the courts may have acted without awareness of the existence of these other statutes.

Whether the Supreme Court's decision in Heckler v. Chaney,[820] will change matters is not at all clear. While that case dealt with judicial review of an agency's refusal to prosecute, some commentators have suggested that many of the factors that the Court relied upon in Heckler to justify the presumption of unreviewability[821] are found in the rule-making area.[822] Clearly Section 553(e) of the APA does not require the granting of any petition. It merely mandates receipt, consideration and expeditious disposition, along with a statement of the reasons for denial.[823] No substantive considerations to govern grant or denial are there laid down. Any such considerations are to be found elsewhere. For example, other petition statutes (or agency substantive rules, policy statements, or internal directives) may limit the administrative discretion to deny petitions to a greater degree[824] or at least specify the factors to be considered in deciding whether to grant or deny a petition.[825] Where this is the case, obviously there is a somewhat greater chance to escape the logic of Chaney[826] to the extent it extends to petitions for rule-making, a matter on which the Court expressly reserved judgment in that opinion.[827]

E. Scope of Review

Where review is available, it is much more intensive with respect to alleged procedural errors[828] than with respect to "matters within the agency's broad policy discretion,"[829] unless there is a statute otherwise specifying the scope of review.[830]

Thus an agency's violation of applicable statutory procedural requirements, whether contained in APA Sections 553 or 555 or elsewhere, and the violation of the agency's own procedural rules risks reversal.[831] If the complaint is inaction or unreasonable delay, however, the court may give great deference to the agency's judgment of when it should finally act,[832] though the existence of statutory or non-statutory time limits for action might in some cases be used as a benchmark for what delay is considered unacceptable.[833] It is clear, however, that a court will permit an agency to refuse to accept a petition for filing only in "the clear case of a filing that patently is either deficient in form or a substantive nullity."[834]

Where the APA provided the only statutory procedural regulation applicable to an agency's petition process, one court expressly refused, in part on the basis of the Supreme Court's Vermont Yankee decision,[835] to reverse an agency's denial of a petition.[836] There it was urged that the agency failed to utilize procedures not found in the APA: the petitioner claimed that it should have been afforded notice of the documents to be relied upon in the agency's decision at some point prior to the denial and opportunity to comment thereon.[837]

However, where an agency receives comments on a petition, it likely has an obligation, as in rule-making,[838] to respond to the significant issues raised thereby in its Section 555(e) statement of denial. Failure to do so could arguably be considered a substantive error justifying remand consistent with the strictures of Vermont Yankee.[839]

When it comes to the substance of the agency decision, a denial risks reversal less when based on policy[840] (including resource availability) than on legal interpretation and more when the governing substantive statute hems agency discretion tightly than in other instances.[841] Practically speaking, the intensity of review may also vary depending on when the denial under review occurs. The earlier it occurs in the rulemaking process the less substantial the record for review is likely to be and, accordingly, the more likely the court will have to accept the agency's assertion at face value.[842]

An agency may possess the authority to develop policy elaboration of the substantive statutes it administers either by means of legislative rules or on a case-by-case basis. In these cases presumably the considerations listed in the second Chenery case[843] and the disposition there evidenced to defer to agency judgment with regard to how best to proceed enter, or should enter, into the calculus with regard to whether to reverse the denial of a petition.[844] This is the case at least where the agency's denial explains its action in ways that invoke this line of precedents.

F. Record for Review

Ever since Citizens to Preserve Overton Park v. Volpe,[845] both the Supreme Court[846] and lower federal courts[847] have generally assumed that judicial review of administrative action should be on the basis of materials which were relied upon by the agency in reaching the decision under review. No different approach has been taken in the cases dealing with review of petition denials.[848] At least one of these opinions noted the waste of time and confusion for the court and parties which may be caused by the agency's failure to maintain, contemporaneously during the decision-making process, a clearly identified group of materials as "the record" for decision which can be later presented to the court on review.[849] This suggests the advisability of formally maintaining a docket file for each petition which at the least contains a copy of the petition, any federal register or other public notices issued relating to it, any comments received in support or opposition,[850] hearing or meeting transcripts, and other documents submitted by the petitioner, commentators or others or generated within the agency[851] which contain materials, not exempt from disclosure under FOIA, which are likely to be considered by the agency in reaching the decision on the petition.[852] The contemporaneous maintenance and clear organization of the record can assist petitioners, the agency and the courts.[853]

VI.

General Conclusions

While the number of petition filings with a few agencies is substantial and a major portion of their resources is devoted to their consideration and disposition, one of the surprising findings of this study is the comparative infrequency with which most federal agencies are presented with statutory petitions for rulemaking, whether filed under the authority of the Administrative Procedure Act or other congressional enactments.[854] In discussing the petition process with individuals who are regularly engaged in administrative practice, quite a few indicated that there were more effective ways to influence agency action, such as informal contact or litigation, and that they would be loath to file a petition for rulemaking because of the delay they expect in the final disposition of their requests. This rather low opinion of the petition process was not, however, shared by all practitioners surveyed. Others viewed the petition process as an important avenue for influencing agency action and some of these considered the existing procedures of various agencies to be well-designed and operated in an acceptable fashion at least in part.

From an agency's point of view, the statutory right to petition for rulemaking is a mixed blessing. It has been and continues to be a source of some valuable ideas for regulatory change, though this may vary from agency to agency. At the same time it can impose strain on already tight agency budgets and be perceived as an unwanted disruption of internally established regulatory priorities. Studies of the Consumer Product Safety Commission have demonstrated the problems which are presented when an agency gives too much priority to the petition process.[855]

It would seem to be impossible to demonstrate with any degree of accuracy that affording the statutory right to petition as it exists under the APA is cost effective. But even if it were not, its continued maintenance is required by the need to give regulated entities and the public at large a formal opportunity to request changes in schemes of regulation which, in matters both large and small, are to a great degree the creation of an unelected bureaucracy which might not always be aware of the need for regulatory modification. Improvement of the process can facilitate and thereby encourage further use of this mechanism.

As indicated at the outset of this report, statutes creating the right to petition for the issuance, amendment and repeal of rules implicitly mandate that some priority be given to the consideration and response to proposals contained in petitions.[856] In surveying current federal agency practice with regard to the treatment of petitions, two issues appear to be of particular importance. First of all, to what extent should agencies solicit the views of the general public or selected sectors thereof prior to the decision to take some formal action on a petition?

Secondly, what degree of procedural formality in the treatment of petitions is required and what degree is optimal for a particular agency or substantive program?

In order to resolve the first question, it is necessary to observe how the petition process relates to the more general process of agency formulation of policy by rule. To state the obvious, ideas for regulatory innovation have numerous sources, both inside and outside the agency. With regard to the latter, the methods of input are various, both formal and informal, and often it is simply not clear where a particular rule had its origin. The APA and other statutes insure that out of the welter of suggestions emanating from the public at least those presented as "petitions" receive serious and expeditious consideration.

The Administrative Procedure Act requires generally that before a proposal, whatever its origin, be formally adopted the agency must solicit the comments of interested persons.[857] The agency may learn much from such submissions, or little, but at least those who may be burdened or benefitted by regulation have been given the opportunity to offer what they believe is relevant factual information, their views and arguments. Some statutes[858] and agency regulations[859] mandate two or more such opportunities. The motivating factor in these instances may be that more information is necessary in order to develop or refine a proposal or it may be deemed politically imperative that the agency move slowly in developing its regulatory program.

Where a petition for rulemaking is filed and the agency is favorably disposed to the ideas presented, the APA thus assures that there is at least one opportunity to convince the agency not to adopt the proposal or at least to modify it in certain particulars. However if an agency, for whatever reason, does not believe that adoption of a proposed regulatory innovation or change is appropriate, there is no requirement in the APA that public input be invited before the agency decides to deny the petition, though such a mandate may be found occasionally in other statutes.[860] It might be argued that just as agency-generated proposals need not be exposed to public view prior to their rejection, an agency should be free to reject the ideas flowing from the public without the need for the solicitation of comment. If an agency believes that it can learn something of relevance as a result of such solicitation, that the proposal is of such significance that the public should know it is under consideration, or that its public image will be bolstered by the practice of soliciting comments, it should feel free to issue a public notice of some kind discussing the petition and requesting reaction. But it should not be bound to do so given the possible costs of public notice and delay that may be occasioned by a comment period.

However, it is likely that an agency may be more resistant to serious consideration of proposals that do not originate within.[861] Inertia may also be a powerful force operating on agency heads and their staff. To the extent the APA mandates that proposals contained in petitions be given serious consideration,[862] an agency should have to engage in at least one round of public solicitation of views on a petition, whether by means of a notice of proposed rulemaking which mirrors petitioner's suggestion or other method that does not so strongly suggest tentative agency approval of the petitioner's ideas. The agency can then reject the proposal only after being confronted with information that may undercut any initial adverse reaction but at any rate only after it explains why, in view of the information forthcoming from the public, it feels it is inappropriate to adopt the petitioner's suggestion.

Discussions with agency personnel for the purpose of this study indicated that often few comments were received until a notice of proposed rule-making was issued by the agency.[863] Since issuance of such a notice might be considered by the agency or the public as a tentative commitment to the ideas proposed therein, agencies may be justifiably reticent to routinely use that mechanism to solicit comments on a petition. But even if they feel this way, as long as the interested public is aware that another mode of solicitation of views on petitions will generally be relied upon and failure to utilize it may mean that the agency will deny the petition for want of supporting information, the number of helpful comments may increase. Even if they do not, at least the agency has made the effort to open up its decisionmaking process in an effort to counteract biases or preconceptions that may otherwise operate both to its and the public's detriment.

The fewer the petitions an agency receives, presumably the lower the aggregate cost to it of comment periods. This suggests that usually any agency which receives a small number of petitions each year is on particularly weak ground in resisting a mandatory comment period. Moreover there are numerous methods of involving persons outside the agency in the decisionmaking process and the costs of these vary significantly. The traditional one is publication of a Federal Register notice soliciting comments, which notice may be entitled "notice of receipt of petition for rulemaking," "advance notice of proposed rulemaking," "notice of inquiry," or "notice of proposed rulemaking." Where those who are most likely to comment are regularly informed by the trade press or otherwise of notices of petition filings posted at the agency's offices,[864] the monetary cost of a comment period may be relatively minimal even where petition filings are substantial in volume. In other instances mailings to selected interested groups can solicit at least a cross-section of the type of comment that might be expected from more extensive solicitation of views.[865]

The delay in the decisionmaking process that may be occasioned by a comment period also involves costs. The petitioner whose proposal might otherwise be summarily rejected is unlikely to complain too vociferously regarding such delay. The petitioner whose suggestion is favorably received by agency personnel may be impatient with the delay caused by an initial round of comments, though such comments may disclose that its proposal has less merit than it seems superficially to possess. However the agency can mitigate this latter problem if there is no legal requirement that it solicit comments before it moves to the issuance of a notice of proposed rulemaking or, where appropriate, the adoption of the final rule. If, however, an initial solicitation of comments on the petition prior to the notice of proposed rulemaking is deemed appropriate, delay can also be reduced by a comment period of relatively short, but reasonable, length such as thirty days.

With respect to those agencies which are under a rigid statutory deadline to grant or deny petitions, as in the case of NHTSA with regard to motor vehicle safety standards and EPA in the toxic substance area, it may be difficult to both publish in the Federal Register a notice requesting comments and meet the deadline on account of the time required for agency clearance of the notice.[866] In these circumstances, the agency might utilize methods other than publication notice, such as letters to potentially interested persons and organizations requesting their input. If solicitation likely to elicit relevant information is simply not feasible if the deadlines are to be met, amendment of the statutes, as recommended later in this report, may be the only way to permit these agencies to engage in meaningful comment periods prior to denial of a petition or issuance of a notice of proposed rule-making.

Otherwise the only exceptions made to the requirement of pre-denial solicitation should usually be in cases where the need to decide the issues raised in the petition have been mooted by other developments, the same issues have been disposed of through the grant or recent[867] denial of a similar petition, the petition requests action that is clearly beyond the statutory jurisdiction of the agency, or the request is clearly frivolous.[868] Any standard devised for summary disposition will inevitably vest some discretion in the agency so that in particular cases the avoidance of the mandatory comment period may be of questionable wisdom or propriety. The good faith of the agency must, however, be assumed here for lack of a better alternative.

Statutes mandating publication of the receipt of a petition for rulemaking in all cases[869] should be amended to permit, on the one hand, summary denial or dismissal on the grounds listed previously and, on the other, dispensing with public notice of the receipt of a petition and proceeding directly to issuance of a notice of proposed rulemaking if the agency is favorably inclined toward adopting the suggestion of the petitioner.[870]

Requiring that agencies generally permit at least one round of comments prior to denial of a petition for rulemaking has certain procedural consequences. A formal public file or docket with identifying control number should be opened and contain a copy of the petition along with any comments received. This permits examination by interested persons of the contents of not only the petition but also any comments and, in this way, allows the filing of reply comments. The two stage comment process of the FCC[871] is not essential for the latter purpose as long as the agency is willing to consider late comments or to reopen the comment period in the case where good cause is shown for the late filing of a comment. Where necessary, presubmission review of requests to hold certain materials confidential can be provided for.[872]

Each public file should be organized in chronological order and also contain copies of letters to the petitioner of grant or denial of the petition, any federal register or other public notices with regard to agency action on the petition as well as correspondence, reports, and other documents that contain factual information that may be relied upon in the decisionmaking process. Documents should be included in the file as soon as possible so that reply comments can address matters contained therein. Correspondence with people outside the agency which contain arguments of law or policy should also be included, though internal staff memoranda of that nature may be excluded. Finally, if a hearing or public meeting has been held to consider the petition, any transcript that was prepared should be added to the file.

If there is judicial review of denial of the petition, the court will expect the record for review to include most of these materials anyway.[873] The creation and maintenance of a public file in this manner may reduce arguments by litigants regarding what should and what should not be in the record for review or at least simplify and expedite the process of compiling the record for review when it becomes necessary to do so. In some cases, the existence of such a file may facilitate agency decision-making by insuring that there is one location where all relevant materials can be found. It is worth noting that some agencies maintain petition records largely in this form at the present time.[874] Assuming the petition is granted, the petition file should become part of the rulemaking record maintained by the agency for reasons surveyed in Appendix C.[875]

Some agencies compile and regularly update public indices which record for each petition the name of the petitioner(s), date of filing, docket or control number, status and/or disposition, subject matter of petition and other information.[876] Some also maintain indices of the contents of petition files.[877] Agencies should at least prepare the former for the benefit of itself and others. Interested persons can use such a list to identify petitions on which they may wish to comment and the control numbers necessary to gain access to relevant files. It operates as an important supplement to other methods chosen to give public notice of the opportunity to comment. At the same time the compilation of this information in one place reduces the need for agency employees to answer questions relating to the identification of a particular petition file and the status of agency action on petitions.

Turning to the second issue posed above, that is the degree of formality of the agency petition process, it is clear that the greater the volume of petition filings, the more important it is for an agency to describe the petition process in writing to advise both the public and agency employees of the requirements and decisionmaking flow.[878] The existence of such documents reduces the amount of agency resources needed to answer questions regarding, for example, the format for petitions and to obtain information from the petitioner that is necessary in order to begin consideration of the proposal made in the petition.[879] Express guidance to staff similarly eliminates time and energy wasted when review responsibilities are not clear. The less distinctive the problems presented by individual petitions the more it is feasible to describe the petition process in some detail. While adoption of such regulations or directives may not eliminate delay, it may reduce it to some extent.

Whether description of the petition process takes the form of a "rule" or internal "handbook," "staff manual," or "order" is not all that important in the abstract. What is crucial from the petitioner's point of view is that the requirements for filing a petition be easily accessible, which generally means publication in the Federal Register or Code of Federal Regulations. Publication of the general outlines of the actions the agency may take in response to the petition, such as issuance of Federal Register notice of receipt or notice of proposed rulemaking or holding a public meeting, is also important. As a matter of fairness, if not good public relations, petitioners and the public at large should not be kept in the dark regarding such matters.[880]

As this report has indicated at various places, some agencies which receive few petitions have not attempted to formally describe in writing any part of the petition process. While this has not apparently provoked substantial criticism or resulted in easily identifiable instances where petitions were either not filed or considered on their merits,[881] it is not consistent with the legislative history of the APA[882] or some of the recommendations of the Administrative Conference.[883] More importantly, the absence of even basic formality in the sense of some implementing regulations or directives can convey the impression to the public and agency employees that consideration and expeditious disposition of petitions is not really that important and in this way the priority attached to petitions by the APA may be undercut.[884] Formalizing the process can mean that the agency-adopted management system includes disposition of petitions as a category of action with respect to which goals must be set and met on a timely basis.[885] In fact agencies which have not publicly explicated even the basic petition process may violate the Freedom of Information Act.[886] That statute requires the publication in the Federal Register of "the established places at which . . . and the methods whereby, the public may . . . make submittals or requests," "statements of the general course and method by which [an agency's] functions are channeled and determined, including the nature and requirements of all formal and informal procedures available," and "instructions as to the scope and contents of all papers."[887]

The lack of such basic information as the address to file a petition may mean that a submission is lost in the correspondence response system of an agency for a considerable period of time. In some instances an agency can be very specific regarding the type of information which it needs in order to consider taking action and the issues that must be addressed, though in others only general instructions are feasible. Published directions to submit in as much detail as possible references to the statutory authority for the requested action, information and arguments supporting the action requested, and the content of the requested rule would seem to be indispensable from the agency's point of view. Most of these are generally found in existing petition regulations.[888] Inviting prospective petitioners to confer with the agency prior to filing in order to make sure that the submission is as complete as possible as well as to explore the need for filing the petition is an excellent practice which is now utilized by several agencies.[889]

Clearly prescribing the form of submission in order to qualify as a petition has the additional advantage from the agency's point of view of allowing it to segregate those communications that must be treated specially under the APA or other petition statute in terms of the seriousness of consideration, expedition in disposition, and explanatory obligations for action taken. Those not meeting the requirements can be treated like ordinary correspondence.

This is not to say that an agency should impose format requirements that are overly strict or that it should not overlook failures to comply with its regulations where appropriate. For example, mandating size of margins and paper are of questionable virtue when it comes to petitions.[890] Experienced practitioners may be used to such requirements and be easily able to comply, though the infrequent petitioner may not. Such restrictions are hardly necessary in order to evaluate the merits of petitions. They are likely to discourage rather than encourage petitions. While it might be argued that neither the APA nor other statutory petition provisions were intended to do the latter but merely to create a right that might be utilized, their very existence suggests that the former is not an appropriate tactic for agencies to adopt.

Moreover since detailed specifications as to form of a petition are the ones most likely to be violated by any other than the experienced petitioner and yet an agency faithful to the spirit of the APA and the petition statutes is most likely to waive compliance with them, an agency is well-advised at the least to adopt elaborate format provisions as recommendations and not requirements.[891] A consistent pattern of waiving compliance with regulations creates more problems than it solves. Where a document does not contain even the basic elements required to begin processing as a petition, the practice of some agencies to advise the petitioner regarding what it needs in order to consider the petition[892] is a good one to follow and clearly consistent with the purpose of petition statutes.

How much beyond basic information regarding form of petition and decisional flow is laid down by rule or otherwise and in what detail should vary from agency to agency depending on the distinctive problems presented by various types of petitions and the felt need to bolster the institutional memory, among other factors. However, in drafting such written documents several general considerations should always be kept in mind:

a. Cross-Reference. In more than a few cases, procedural regulations have been adopted by an agency where it is simply not clear whether they apply to the petition process.[893] In order to clarify matters for other than the experienced petitioner, a set of petition regulations should expressly cross-reference any other applicable procedural regulations. While experienced practitioners might be able to ascertain, for example, that certain regulations regarding the form of documents filed with the agency must be complied with in filing a petition, other petitioners may not.

b. Coverage. The regulations or other agency descriptions of the petition process should clearly specify their scope of coverage. For example, are they applicable to all petitions, whether filed under the APA or other statutes, to all agency statements whether denominated substantive, interpretative or procedural rules, and to all agency substantive programs?

c. Multiplication of Petition Regulations. There should be a good reason to have more than one set of petition regulations.[894] If, for example, the same requirements apply to all petitions regardless of the type of rulemaking action requested, there is generally no reason to have more than one set of regulations. Cross-references to that set can be included in the various parts of the Code of Federal Regulations when it is deemed likely that prospective petitioners may not resort to the general regulations.

One of the consistent complaints regarding the petition process is the delay encountered in the final disposition of petitions.[895] As indicated earlier in this report,[896] a grant of an APA petition should be considered to occur only on the issuance of the final rule conforming to the petitioner's request. This interpretation may give the impression that an agency has been particularly laggard in disposing of petitions[897] but this is hardly a reason to reject it given the potential consequences of the alternative interpretations.[898]

The means of reducing real delay that jumps most readily to mind is imposition by statute of strict time deadlines for agency action on petitions. It is noteworthy in this regard that where

Congress has imposed those with regard to the petition process the grant of a petition is often considered to occur prior to the commencement of the rulemaking. This avoids the problems caused by requiring an agency to complete its disposition of often complex factual and policy issues within an overly definite timeframe.[899] However, mandating only that a "first-cut" with regard to petitions occur within a stated period presents various difficulties of its own.[900] In that case completion of the rulemaking is arguably not subject to the APA's requirement of reasonable promptness. Explanation of the reasons for ultimately rejecting petitioner's proposal may also not be required.[901] Where these statutory deadlines exist, they are often not met by the agency because they are unrealistic[902] but where an agency takes the deadline more seriously than the need to consider the merits of the petition, apparently a rare case,[903] the easiest course of action may be to deny the petition, particularly where judicial review or reversal is deemed unlikely. As other studies have demonstrated, specific deadlines are effective as a management tool but are of questionable value when enacted into law.[904]

The APA mandate that the grant or denial occur within a reasonable time[905] together with its treatment of a grant as occurring at the time of issuance of a final rule appears to be the optimal statutory solution in most cases. Congress should seriously reconsider those petition statutes that do not adopt that approach.[906] At the same time, agencies should be encouraged, or required if necessary, to establish on their own uniform or individually set target deadlines for action on petitions, such as dates for issuance of solicitation of comments on a proposal, denial if the proposal lacks merit, and issuance of notice of proposed rulemaking. Such deadlines are more likely to be realistic than those established by Congress. While failure to comply with self-imposed deadlines is hardly a rare phenomenon,[907] at least violation of agency targets for action undermines respect for the authority of law less than frequent disregard of statutory mandates.

Disposition of petitions can be expedited in a number of other ways, including precise specification of the form of a petition, keeping comment periods to a reasonably short time, and delegation within the agency of decisionmaking authority with regard to both the grant and denial of petitions.[908] Clear assignment of responsibility within the agency for determining whether something qualifies as a petition and where a properly filed petition should be referred for review on the merits may also be important both to reduce delay as well as for other reasons. Where an agency receives a substantial number of petitions or the disposition of even one of the type of petition generally received is resource intensive, the agency might consider adoption of a classification system based on appropriate criteria (such as degree of risk to the public) for determining which among the proposals presented should be assigned priority over others in terms of commitment of agency money and manpower.[909]

Tracking systems for petitions vary from agency to agency. They may be very extensive where the petition volume is substantial and relatively informal where few petitions are filed. The form of tracking is not as important a factor in reducing delay as the effort to periodically ascertain the status of work on a petition and require explanation for delays where they have occurred.[910]

With regard to delay in disposition of petitions, some agencies routinely give status reports to petitioners at specific intervals.[911] Mandating these, at least where the petitioner can easily consult an index of pending petitions which shows the up-to-date status or take the initiative and call an agency official for a report, may only create a routine of little value either to the agency or the petitioner. Notification to the petitioner early in the process of the name of a contract person who can inform it of the status and generally serve as a liaison between the agency and the petitioner has much to recommend it.[912] All of this is not to say that where the delay becomes very substantial the agency should not make some effort on its own initiative to notify the petitioner regarding the reason for the delay and give some indication what action can be expected on the petition in the near future.

One very significant issue is the extent of the agency obligation to go outside of the information supplied by the petitioner (and commentators) and that possessed at the time by the agency to gather other relevant data that may support the petitioner's contentions. Sometimes agencies do engage in this practice,[913] though how often is not clear. It may be that the more a proposal appeals to those agency officials that are charged with making the initial decision on the petition the more likely the agency will go the extra mile in assisting the petitioner in this regard. Conducting such an investigation in each case would impose a substantial burden on already stretched agency resources that could probably not be justified by the value of the information which is likely to be discovered. Formulating sufficiently specific criteria that could be of any assistance in making the decision to go beyond the information supplied by petitioner and commentators or already possessed by the agency would seem to be impossible. Fortunately or unfortunately, the only feasible solution would appear to be to leave it to the agency to decide when further data gathering would be productive and appropriate.

Personal notification to the petitioner of a denial (with reasons) of a petition appears to be standard practice with federal agencies,[914] though some petition statutes other than the APA require only publication notice.[915] Mandating publication of notice of denial in every case is a questionable use of scarce resources. Certainly the disposition of certain petitions may be of general public importance by, for example, indicating the drift of agency policy, and notification of them should be widely disseminated,[916] though the Federal Register may not be the most effective means to do this.[917] The optimal approach would appear to be to permit the agency in its discretion to notify persons other than the petitioner of the denial of a petition and the reasons therefor and by the method deemed most appropriate in the circumstances. In cases where only the petitioner is notified, it is not too much to ask that those persons who are aware of the filing consult the public index of petitions in order to determine the disposition and review the public file for the letter of denial. If someone is not aware of the proceeding but has a similar proposal, the agency will presumably notify the new petitioner of the previous disposition when the new petition is filed.

The APA does not require personal notification of the grant of a petition, though many agencies afford it on their own[918] or because other statutes require it.[919] Sometimes a grant connotes the issuance of a final regulation and in other instances merely that the agency will commence a rulemaking proceeding. To the extent the agency action to adopt a rule or begin a rulemaking proceeding is traceable to the petition of a member of the public, as a matter of courtesy it would seem appropriate to personally inform the petitioner that its request has been favorably acted upon.

One final issue with regard to grants and denials of petitions must be addressed. Where the grant of a petition does not occur until the final issuance of a rule, a denial may occur at any one of various stages in the public process of consideration. The agency must not neglect a formal disposition of the petition. For example, the advance notice of proposed rulemaking may mirror the petitioner's request but the notice of proposed rulemaking may differ substantially from it.[920] In this circumstance a denial has occurred and Section 555(e) requires notification to the petitioner. It is particularly easy to overlook the need for this when a petition has been folded into an ongoing rulemaking as is often the case.[921]

Agencies differ in their practices with regard to reconsideration of decisions and this impacts on the petition area. Some do not speak to the issue at all in the petition context.[922] Often there is a clear distinction between a request for reconsideration of action on a petition and a request for reconsideration of action in adopting a final rule. Where, however, a grant of a petition connotes the adoption of a rule and a denial occurs because the final rule differs from the petitioner's request, a petition to reconsider may be both. For simplicity it might be argued that whenever there is a request for reconsideration (assuming the agency entertains such requests) it be treated as a petition for rulemaking subject to procedures applicable thereto and some agencies so provide.[923] However the procedures for considering petitions for rulemaking may not be at all appropriate in the case of reconsideration because, for example, of the need for expeditious action, the minimal value of some of the procedures applicable to rulemaking petitions if applied at the reconsideration stage, and the existence of an already compiled record for decision. Agencies should first of all, therefore, be very clear in their regulations whether reconsideration must be sought through the normal petition procedures. Moreover, for simplicity, different procedures applicable to reconsideration (if authorized) should be mandated only when deemed absolutely necessary.

There remains the question regarding the applicability of the foregoing recommendations to (1) matters and functions which have been traditionally considered exempt from the APA right to petition but which are not or should not be exempt[924] and (2) interpretative rules, general statements of policy and rules of agency organization, procedure and practice which are without doubt currently subject to Section 553(e).[925]

As to the former, some of the aspects of the proposed petition process, such as the suggested petition format, may be equally appropriate for those agencies authorized to handle the matters and functions described in Section 553(a). However, public solicitation of views with regard to a petition and the procedures required to effectuate that requirement, such as the maintenance of a public docket, are the ones most likely to raise objections. Without further investigation, mandating that procedure in these cases would appear to be inappropriate at this time.

With regard to the latter, the APA permits adoption of interpretative rules, general statements of policy and procedural rules by an agency on its own initiative without prior solicitation of views.[926] To require public solicitation following adoption in response to a petition to amend or repeal as well as in those cases where the idea is initially presented by the petition and is not agency generated would not appear to impose an unreasonable burden on the agency in most instances and yet may elicit useful information. In fact existing recommendations of the Administrative Conference suggest a somewhat similar approach, except in cases where the agency finds that solicitation "would serve no public interest or would be so burdensome as to outweigh any foreseeable gain."[927] Therefore, agency practice with regard to these rules should be substantially the same as that with respect to legislative rule-making.

Finally, the proliferation of special petition statutes is a matter that should be reconsidered by Congress. In addition to the problems previously surveyed[928] some of these statutes create confusion, add little to existing agency power, or cause administrative inefficiency without corresponding benefit. RCRA is an example of the first given its rather opague mandate to "take action" within a reasonable time.[929] Authorization in the TSCA to investigate the subject matter of a petition by various methods is an instance of the second.[930] Finally, the mandate to publish notice of receipt in all cases or notice of denial illustrates the third.[931]

Accordingly, Congress should carefully review these statutes to determine whether they are really needed. Aside from novel approaches to judicial review,[932] their most significant addition to the APA is the imposition of specific time limits for agency action, a difference of questionable value.[933] To the extent these are repealed, the APA will serve as the unifying benchmark for agency petition practice.[934] If necessary, Congress could direct federal agencies to adopt minimal procedures such as those suggested in Appendix D or the somewhat more modest recommendations adopted by the Administrative Conference on the basis of this study and leave further elaboration to the agency's informed discretion.

Postscript

On December 4, 1986 the Plenary Session of the Administrative Conference adopted the following Recommendation.

1 CFR § 305.86-6

Recommendation 86-6

Petitions for Rulemaking

Adopted December 4, 1986

The Administrative Procedure Act (APA) requires each federal agency to give interested persons the right to petition for the issuance, amendment, or repeal of a rule, 5 U.S.C. § 553(e). The APA also requires that agencies conclude matters presented to them within a reasonable time, 5 U.S.C. § 555(b), and give prompt notice of the denial of actions requested by interested persons, 5 U.S.C. § 555(e). The APA does not specify the procedures agencies must follow in receiving, considering, or disposing of public petitions for rulemaking.[1] However, agencies are expected to establish and publish such procedures in accordance with the public information section of the APA. See ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 38 (1947). An Administrative Conference study of agency rulemaking petition procedures and practices found that while most agencies with rulemaking power have established some procedures governing petitions for rulemaking, few agencies have established sound practices in dealing with petitions or responded promptly to such petitions.

This Recommendation sets forth the basic procedures that the Conference believes should be incorporated into agency procedural rules governing petitions for rulemaking. In addition, the Conference encourages agencies to adopt certain other procedures and policies where appropriate and feasible. The Conference feels that, beyond this basic level, uniform specification of agency petition procedures would be undesirable because there are significant differences in the number and nature of petitions received by agencies and in the degree of sophistication of each agency's community of interested persons.

Agencies should review their rulemaking petition procedures and practices and, in accordance with this Recommendation, adopt measures that will ensure that the right to petition is a meaningful one. The existence of the right to petition reflects the value Congress has placed on public participation in the agency rulemaking process. The Administrative Conference has recognized, in past recommendations, the benefits flowing from public participation in agency rulemaking and from publication of the means for such participation.[2] The absence of published petition procedures, excessive or rigidly-enforced format requirements, and the failure to act promptly on petitions for rulemaking may undermine the public's right to file petitions for rulemaking.

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[1] But other statutes expressly create the right to petition for rulemaking, and some of these statutes specify procedures to be followed in the petitioning process.

Some agencies currently have petition-for-rulemaking procedures that are more elaborate than those recommended in this Recommendation. This Recommendation is not intended to express a judgment that such procedures are inappropriate or that the statutes mandating particular procedures should be amended. Nor is the Recommendation intended to alter the prior position of the Conference recommending elimination of the categorical exemptions of certain types of rulemaking from the APA's rulemaking requirements. See Recommendations 69-8 and 73-5. To the extent Congress or agencies adopt those recommendations, they should also expressly apply the right to petition to those types of rulemaking.

RECOMMENDATION

1. Agencies should establish by rule basic procedures for the receipt, consideration, and prompt disposition of petitions for rulemaking. These basic procedures should include: (a) specification of the address(es) for the filing of petitions and an outline of the recommended contents of the petition, such as the name, address, and telephone number of the petitioner, the statutory authority for the action requested, and a description of the rule to be issued, amended, or repealed; (b) maintenance of a publicly available petition file; and (c) provision for prompt notification to the petitioner of the action taken on the petition, with a summary explanatory statement.

2. In addition, agencies should, where appropriate and feasible:

a. make their petition procedures expressly applicable to all types of rules the agency has authority to adopt;

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[2] See RECOMMENDATION 69-8, Elimination of Certain Exemptions from the APA Rulemaking Requirements, 1 C.F.R. § 305.69-8; RECOMMENDATION 71-6, Public Participation in Administrative Hearings, 1 C.F.R. § 305.71-6; RECOMMENDATION 73-5, Elimination of the "Military or Foreign Affairs Function" Exemption from APA Rulemaking Requirements, 1 C.F.R. § 305.73-5; RECOMMENDATION 76-5, Interpretive Rules of General Applicability and Statements of General Policy, 1 C.F.R. § 305.76-5; and RECOMMENDATION 83-2, The "Good Cause" Exemption from APA Rulemaking Requirements, 1 C.F.R. § 305.83-2.

b. provide guidance on the type of data, argumentation, or other information the agency needs to consider petitions;

c. develop effective methods for providing notice to interested persons that a petition has been filed and identify the agency office or official to whom inquiries and comments should be made; and,

d. establish internal management controls to assure the timely processing of petitions for rulemaking, including deadlines for completing interim actions and reaching conclusions on petitions and systems to monitor compliance with those deadlines.

Footnotes

1. Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. 99-177, 99 Stat. 1038, 2 U.S.C.A. § 901 et seq. (Supp. 1986), declared unconstitutional in part in Bowsher v. Synar, 106 S. Ct. 3181 (1986).

2. See Administrative Conference of the United States, A GUIDE TO FEDERAL AGENCY RULEMAKING 248-272 (1983) for a selected bibliography of the administrative law literature produced over the last fifteen years.

3. 5 U.S.C. § 551 et seq. (1982).

4. Id. § 553(e).

5. See Appendix A infra.

6. See Appendix C infra.

7. See text accompanying notes 797-853 infra.

8. See 105 S. Ct. 1649 (1985).

9. See text accompanying notes 820-27 infra.

10. See Oil, Chemical & Atomic Workers International Union v. Zegeer, 768 F.2d 1480 (D.C. Cir. 1985) (delay) (but noting that issue presented was not refusal to initiate rulemaking).

11. See text accompanying note 181 infra.

12. See text accompanying notes 220-796 infra.

13. See text accompanying notes 854-934 and Appendix D infra.

14. Id.

15. But see, e.g., text at notes 733-40 infra.

16. See, e.g., 10 C.F.R. § 430.27 (test procedure waiver).

17. See, e.g., 16 C.F.R. § 1.16 (exemption from trade regulation rules).

18. See, e.g., 40 C.F.R. § 260.30 (variance from solid waste classifications).

19. 5 U.S.C. § 551(4) (1982). See, e.g., 15 U.S.C. § 57a(g)(2).

20. See, e.g., 16 U.S.C. § 824d(e) (1982) (rates for transmission or sale of electric energy).

21. See, e.g., 7 C.F.R. Part 900.

22. *See*, *e.g.*, 50 U.S.C. App. § 2406(c) (1982).

23. *See* text preceding note 99 *infra*.

24. *See* text at note 102 *infra*.

25. *See* text accompanying note 103 *infra*.

26. Congressional Research Service, Library of Congress, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 1030 (1973) (Jayson, *et al.* eds.) (hereinafter THE CONSTITUTION: ANALYSIS).

27. *Id.* at 1031.

28. 1 Wm. & Mary, Sess. 2, ch. 2. (1689).

29. *See* 1 B. SCHWARTZ, THE BILL OF RIGHTS--A DOCUMENTARY HISTORY 198 (1971).

30. U.S. CONST. amend. I.

31. THE CONSTITUTION: ANALYSIS 1032.

32. R. CUSHMAN, CASES IN CIVIL LIBERTIES 491 (1968).

33. *See* THE CONSTITUTION: ANALYSIS 1031.

34. *See* California Motor Transport Co. v. Trucking Unlim., 404 U.S. 508, 510 (1972).

35. 5 U.S.C. § 553(e) (1982).

36. For a discussion regarding the meaning of the term, "interested person," *see* text accompanying notes 81-87 *infra*.

37. *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE 586 (2d ed. 1978); Bonfield, *Military and Foreign Affairs Rulemaking Under the APA*, 71 Mich. L. Rev. 221, 356 (1972); Bonfield, *Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits, or Contacts*, 118 U. Pa. L. Rev. 540, 600 (1970).

38. 5 U.S.C. § 553(a) (1982). *See* DAVIS, *supra* note 37, at 586 (referring to this as a "flaw of draftsmanship") and Bonfield, *supra* note 37, 71 Mich. L. Rev. at 230-31 and 118 U. Pa. L. Rev. at 549-50.

39. 5 U.S.C. § 553(a)(1) (1982).

40. *Id.* § 553 (a)(2).

41. *Id.* § 553(a) provides in part: "This section applies, according to the provisions thereof, except to the extent

that there is involved--. . . ." Since 553(e) is part of Section 553, the import of this language is to suggest that where the matters and functions listed in 553(a)(1) and (a)(2) are involved, Section 553(e) has no application.

42. That such an interpretation may not be correct is discussed in the text accompanying notes 104-20 infra.

43. See Senate Judiciary Committee Print, June 1945, reprinted in Administrative Procedure Act, Legislative History, Sen. Doc. No. 248, 79th Cong. 2d Sess. (hereinafter "Legislative History") 21 (1946): "One agency objects to the statutory statement of a right of petition on the ground that it would 'force' a 'tremendous' number of hearings. The alternative implied is that no one should have a right of petition, leaving action or inaction to the initiative of the agency concerned. Even Congress, under the Bill of Rights, is required to accord the right of petition to any citizen."

In explaining the House bill, Congressman Walter noted: "The right of petition is written into the Constitution itself. This subsection confirms that right where Congress has delegated legislative powers to administrative agencies." Id. at 359. See also id. at 78 (statement of Carl McFarland before House Judiciary Committee).

44. 441 U.S. 463 (1979).

45. 465 U.S. 271 (1984).

46. 441 U.S. at 465; 465 U.S. at 286-7. The Court in Knight also rejected the Due Process Clause as a source of an obligation on the part of the government to listen to or hear the public with regard to policymaking, id. at 283-5, and in doing so relied on Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441 (1915). In her opinion for the majority in Knight, Justice O'Connor added that disagreement with public policy and disapproval of officials' responsiveness is to be registered principally at the polls. 465 U.S. at 285.

47. For this descriptive phrase, I am indebted to a former colleague, Tom Gerety, now Dean of the University of Cincinnati College of Law.

48. See sources cited in note 43 supra.

49. U.S. CONST. amend. I.

50. See note 43 supra.

51. See text accompanying notes 44-47 supra.

52. See Legislative History at 201, 260. See also id. at 21, 359, 409.

53. 5 U.S.C. § 555(b) (1982).

54. Id. § 555(e).

55. See Legislative History at 201, 206, 260, 265, 268. The notice and explanation obligations are, by the express terms of Section 555(e), limited to petitions "made in connection with any agency proceeding," suggesting that they may not apply unless a proceeding is pending at the time of the filing of the petition. Cf. Beltone Electronics Corp. v. FTC, 402 F. Supp. 590, 596-7 (N.D. Ill. 1975). That situation obviously does not exist in those instances where no rule-making action has been commenced by the agency and a petition is filed by a person to initiate agency action. However, the legislative history of Section 553(e) indicates that it was not Congress's intention to so limit the requirement for notice and explanation of the grounds of a denial. See Legislative History at 201, 260.

In 1981 Congress seriously considered amending the APA. The Report of the Senate Committee on Governmental Affairs noted that one of the proposed amendments to Section 553(e) clarified the original intent of the drafters of the APA that the requirements of Section 555(e) apply to petitions. See Regulatory Reform Act, Sen. Rep. No. 97-305, 97th Cong., 1st Sess. 31 (1981). The Committee noted that the clarification was in response to instances in which petitions languished for years awaiting an agency response. Id.

The legislative history of Section 555(e) seems to suggest that the requirement of prompt decision on petitions, as opposed to prompt notification of decisions made, was to be found in that provision. See Legislative History at 206, 265. The Senate Committee in 1981 seemed to share this understanding of Section 555(e). See Regulatory Reform Act, Sen. Rep. No. 97-305, 9th Cong., 1st Sess. 31 (1981). However, only in Section 555(b) is there express language mandating decision in a timely fashion, though the committee reports regarding that provision suggest a somewhat more limited scope than the language adopted displays on its face. See Legislative History at 204, 263 ("Agencies are to proceed with reasonable dispatch to conclude any matter so presented . . . .) (emphasis added). Regardless of whether the requirement for prompt decision is found in subsection (b) or (e) should not, however, be of great moment.

56. See text at note 52 supra.

57. 5 U.S.C. § 555(b) (1982).

58. Bonfield, supra note 37, 118 U. Pa. L. Rev. at 548.

59. 5 U.S.C. § 555(e) (1982).

60. 5 U.S.C. § 555(b) (1982): "With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time each agency shall proceed to conclude a matter presented to it." *See* text at note 590 *infra*.

61. Despite an opinion to the contrary expressed in the ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT ("ATTORNEY GENERAL'S MANUAL") 39 (194), the APA's legislative history need not be construed to suggest that denial of petitions for rulemaking cannot be judicially reviewed and reversed. *See* Legislative History at 201 ("The refusal of an agency to grant the petition or to hold rule making proceedings, therefore, would not per se be subject to judicial *reversal*. *However, the facts or considerations brought to the attention of an agency by such a petition might be such as to require the agency to act to prevent the rule from continuing or becoming vulnerable upon judicial review, through declaratory judgment or other procedures pursuant to section 10*.) *But see* Regulatory Reform Act, Report to the Committee on Governmental Affairs, S. Rep. No. 97-305, 97th Congress, 1st Sess. 31 (". . . an agency's failure to grant a petition is not subject to judicial review . . . .").

In light of this ambiguous history, the courts have recently held that denial of petitions for rule-making are presumptively subject to judicial review for procedural and substantive errors, though the scope of review of the latter may be very narrow. *See* text accompanying notes 815-27 *infra*.

Obviously there are many factors that may enter into a decision not to issue a rule or even to engage in the rulemaking process in response to a petition, including the lack of agency resources, other agency priorities, and inconsistency with agency policy. The scope of discretion may generally be broad but still is not necessarily unlimited. Since a denial must be accompanied by a "brief statement of the grounds," and since the courts require reasoned decision-making even here, some effort must be made to give a thoughtful response. Failure to do so simply invites judicial reversal.

Even aside from the possibility of judicial review, the petition process of the APA is action-forcing since the statute mandates receipt, consideration and prompt response to a petition. However the possibility of judicial review and reversal stands as a warning to the agency to be diligent in undertaking its responsibilities here as in other areas of administrative law.

62. See Tomlinson, Report on the Experience of Various Agencies with Statutory Time Limits Applicable to Licensing or Clearance Functions and to Rulemaking, 1978 ACUS Recomm. & Rep. 119, 145.

63. Without judicial review, consideration given to a denial may be superficial at best. Therefore, to a large extent, the practical difference between the interpretations depends on the availability and scope of judicial review of the substantive merits of a decision to deny a petition.

64. See 5 U.S.C. § 555(b) (1982).

65. This may not occur until after issuance of a notice of proposed rulemaking.

66. See text preceding note 813 infra.

67. Both the Senate and House Reports indicate that agencies must "fully" consider petitions, Legislative History at 201, 206; that "[t]he agency may either grant the petition, undertake public rule making proceedings . . . or deny the petition," id.; and that "[t]he mere filing of a petition does not require an agency to grant it, or to hold a hearing, or engage in any other public rulemaking proceedings." Id. The latter two statements might be taken as supporting the proposed interpretation since a "grant" is apparently seen as distinct from the public procedures leading up to the issuance of a final rule. In explaining the House version of the bill, Congressman Walters noted with regard to Section 553(e) that "[n]o agency may receive such petitions in a merely pro forma manner." Id. at 359.

In commenting on what is now Section 553(e), the Attorney General's Manual noted that "[i]f the agency is inclined to grant the petition, the nature of the proposed rule would determine whether public rule making proceedings under section 4(a) and (b) are required." ATTORNEY GENERAL'S MANUAL 39 (1947). If a grant were considered to occur prior to the issuance of a final rule, it would seem that the reference would be to "grant", not "inclined to grant." Moreover, it is somewhat difficult to understand why Congress would have gone to the trouble of including a provision like 553(e) if the alternative interpretation is the correct one. See also text at notes 123-27 infra.

68. In 1981, the Senate Committee on Governmental Affairs, in proposing an amendment to Section 553 requiring a response to a petition "with reasonable promptness," noted its recognition "that agency action in response to petitions must be consistent with other obligations and demands on agency resources. A delayed response might well be justified where the pressure of events requires the agency to devote its scarce resources to other matters of greater urgency."

Regulatory Reform Act, Sen. Rep. 97-305, 97th Cong., 1st Sess. 31 (1981). It is submitted that the proposed interpretation of the APA does not undercut this agency flexibility. At the same time these committee comments are consistent with a view of the priority which agencies should as a general matter assign to the handling of petitions.

69. See, e.g., text at notes 372-73, 433-38 infra.

70. See Legislative History at 260, 359. The former, though not the latter reference, might be considered ambiguous in its implications: it might be construed to mean that if there are procedures, the agency must comply with them.

71. ATTORNEY GENERAL'S MANUAL at 38.

72. Section 559 of the Act gives each agency "the authority necessary to comply with the requirements of this subchapter through the issuance of rules." 5 U.S.C. § 559 (1982).

73. ATTORNEY GENERAL'S MANUAL at 38.

74. See Appendix C at notes 8-18 infra.

75. 5 U.S.C. § 552 (1982).

76. Id. § 552(a)(1). Many federal agencies have failed to comply with the requirements of Section 552(a)(1)(A), (B) and (C) with regard to matters other than the petition process. See 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE 340 (1978).

77. Id. § 552(a)(1)(A).

78. Id.

79. Id. § 552(a)(1)(B).

80. Id. § 552(a)(1)(C).

81. Id. § 553(e).

82. ATTORNEY GENERAL'S MANUAL at 38.

83. See Legislative History at 201, 260.

84. 5 U.S.C. § 553(c) (1982).

85. Id. § 555(b).

86. Id. § 555(e).

87. Id. § 702.

88. See, e.g., text at notes 224-26, 299-302 infra.

88a. See text at note 302a infra.

89. Accord ATTORNEY GENERAL'S MANUAL at 38.

90. Section 555(b) requires in part that "[s]o far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation . . . or determination of an issue, request, or controversy . . . in connection with an agency function." 5 U.S.C. § 555(b) (1982). This provision gives some right of presentation and consideration outside the petition context but it is qualified, by among other things, the introductory clause. See generally Legislative History at 205, 264 (suggesting, however, a narrow compass for that clause) and ATTORNEY GENERAL'S MANUAL at 63 (suggesting a broader scope for it).

91. See, e.g., National Org. for Reform of Marijuana Laws v. Ingersoll, 497 F.2d 654, 659 (D.C. Cir. 1974). Where the right to petition under Section 553(e) applies, there is no need for the petitioner to rely on the obligation imposed by Section 555(b), "[s]o far as orderly conduct of public business permits," for an agency to allow interested persons to present requests to it. The right to presentment exists under Section 553(e), though qualified by the limited discretion of the agency to define the manner [including format and content] and place of presentment. As indicated previously, the constitutional right to petition is in essence a right to presentment only. See text at notes 44-47 supra. The APA right encompasses this as well as imposes obligations of receipt, consideration and final disposition on the merits, which obligations are subject to the limited procedural discretion defined in the text to dismiss for noncompliance with reasonable procedural guidelines defining the manner and place of presentment. Such guidelines might include requirements that the request be entitled "petition," make a clear statement of the type of action requested, specify the interest of the petitioner in the matter, include supporting arguments and data, and be filed with a particular official at a particular address. See ATTORNEY GENERAL'S MANUAL at 38.

92. 5 U.S.C. § 555(b) (1982).

93. In fact, unless an agency has guidelines identifying both for its own and the public's purposes what constitutes a petition within the meaning of Section 553(e), the thrust of that provision would seem to be that an agency must accept, consider and dispose of on the merits any and all requests from the outside that suggest in any way "the issuance, amendment, or repeal of a rule." An agency may justifiably not want to be under this type of obligation to the extent that the APA petition process is both action-forcing and priority-setting.

94. 5 U.S.C. § 555(e) (1982).

95. *See*, *e.g.*, Brock v. Cathedral Bluffs Shale Oil Co., ___ F.2d ___, 63 Ad. L. 2d 805 (D.C. Cir. 1986). *See generally* Note, *Violations by Agencies of Their Own Regulations*, 87 Harv. L. Rev. 629, 630 (1974).

96. 5 U.S.C. § 553(b) (A), (B) (1982).

97. By their terms, these are exceptions only to Section 553(b). *Id.*

98. *See*, *e.g.*, Bonfield, *supra* note 37, 71 Mich. L. Rev. at 310; 118 U. Pa. L. Rev. at 600-01.

99. 5 U.S.C. sec. 701(a)(1), (2) (1982).

100. *See* text at notes 828-44 *infra*.

101. *See* text following notes 139 and 152 *infra*.

102. *See* text following note 147 *infra*.

103. *See* text at note 55 *supra*.

104. *See* text at notes 37-42 *supra*.

105. Legislative History at 257.

106. *Id.* ("But *these exemptions* are not to be taken as encouraging agencies not to adopt voluntary public rule-making procedures where useful to the agency or beneficial to the public.") (Emphasis added.)

107. *Id.* at 199.

108. *Id.* at 235, 283-290, 354, 422-23.

109. *Cf.* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE 312-14 (1978).

110. *See* Legislative History at 199, 257.

111. *Id.*

112. *See* note 43 *supra*.

113. *See* note 37 *supra*.

114. *See* Bonfield, *supra* note 37, 71 Mich. L. Rev. at 356; 118 U. Pa. L. Rev. at 600. With respect to the military and foreign affairs functions, he did suggest that in some instances a statement of reasons under 555(e) might have to be kept confidential. *See* 71 Mich. L. Rev. at 324. Nothing in this report suggests that in some instances such treatment

should not be deemed appropriate or that Congress should restrict the exercise of reasoned discretion in that regard.

115. To the extent his conclusion regarding the lack of need for exceptions to the right to petition was founded on his perception of the minimal burden imposed on agencies by Section 553(e) and 555(e), this latter assumption may have been based on a view of 553(e) as not involving special obligations on an agency to give some priority to the handling of petitions.

116. _Cf._ 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE 586 (1978).

As originally enacted, what is now Section 553 of Title 5 was Section 4 of the Administrative Procedure Act. _See_ Pub. L. No. 404, 60 Stat. 237, Ch. 324, §§ 1-12, enacted June 11, 1946. The exceptions for certain matters and functions formed the introductory clause of the entire section which clause was followed by a dash and then four subsections (a)(notice), (b)(procedures), (c)(effective dates) and (d)(petitions). Section 4 provided:

> Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts--
>
> (a) NOTICE.--General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

> (b) PROCEDURES.--After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.
>
> (c) EFFECTIVE DATES.--The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.
>
> (d) PETITIONS.--Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule.

Pub. L. No. 404, 60 Stat. 237, 238-39, ch. 324, § 4. When Title 5 was prepared for enactment into positive law in 1966, see Pub. L. No. 89-554, 80 Stat. 381 (Sept. 6, 1966), the revisers put the exceptions in a new subsection 553(a) and added at the beginning of that the words, "This section applies, according to the provisions thereof," id. 80 Stat. 383-4, thus accepting at face value what the structure of Section 4 seemed to suggest.

However the content and arrangement of the first three subsections of Section 4 was substantially different from the last subsection, what is now Section 553(e). The former lay down sequentially the steps that "the agency" must take in adoption of non-exempt rules. When it came to subsection (d), the direction was not to merely "the agency" but to "every" (now "each") agency. See Pub. L. No. 404, 60 Stat. 237, 238-9. Moreover we move from the end of the rulemaking process to the a point prior to the formal beginning of the rulemaking process as regulated by the APA. These shifts, though subtle, are some basis for assuming that when the draftsman left subsection (c) behind, he or she meant to create a provision separate and apart from all that proceeded it but for one reason or another neglected to clearly do so.

117. See Bonfield, supra note 37, 118 U. Pa. L. Rev. at 543.

118. See text preceding note 99 supra.

119. See, e.g., 32 C.F.R. §§ 296.2(d)(1), 296.4(a), 296.6. See also Letter from Robert L. Gilliat, Assistant General Counsel (Personnel and Health Policy), Department of Defense to author (May 23, 1986).

120. But see note 114 supra.

121. See, e.g., 42 U.S.C. 7604 (1982) (citizen suits under Clean Air Act).

122. See text at notes 59-69 supra. For example, 49 U.S.C. § 10326(a) (1982) refers to an APA Section 553(e) petition "to begin a rulemaking proceeding" and if the ICC grants it, it must "begin an appropriate proceeding." Under 16 U.S.C. § 1533(b)(3) (1982) a petition under APA Section 553 to list a species as endangered may result in one of three findings, including that the "petitioned action is warranted, in which case the Secretary shall . . . publish . . . the complete text of a proposed regulation . . . ." [Emphasis added.]

123. See, e.g., 15 U.S.C. § 1410a(a) (1982) (motor vehicle safety standards).

124. 30 U.S.C. § 1211(g)(1) (1982) (surface mining and reclamation).

125. Id.

126. 5 U.S.C. § 553(e) (1982).

127. R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 224 (1975).

128. See, e.g., 42 U.S.C. § 4905(f) (1982).

129. See, e.g., 49 U.S.C. § 10326(a).

130. See text at notes 914-17 infra .

131. See, e.g., 1 C.F.R. 305.71-6 (ACUS Recommendation E.).

132. See text at note 55 supra.

133. 5 U.S.C. §§ 601-612 (1982).

134. Exec. Order No. 12,291, 3 C.F.R. 127 (1981), reprinted in 5 U.S.C. app. § 601, at 136 (Supp. V 1981).

135. Exec. Order No. 12,498, 3 C.F.R. 323 (1986), reprinted in 21 Weekly Comp. Pres. Doc. 11 (Jan. 7, 1985).

136. OMB, Interim Regulatory Impact Analysis Guidance (June 13, 1981) (hereinafter "Impact Guidance"); OMB Bulletin No. 85-9, The Administration's Regulatory Program--1985 (Jan. 10, 1985) (hereinafter "Bulletin No. 85-9"). Both of these are reprinted in ACUS, FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK 31, 43 (1985).

137. For example, the Environmental Protection Agency has no general set of petition regulations or other statements implementing section 553(e) of the APA. *See* text at note 774 *infra*.

138. *See*, *e.g.*, 7 C.F.R. § 1.28 (Department of Agriculture, APA process); 30 C.F.R. § 700.12 (Surface Mining Reclamation and Enforcement, implementing 30 U.S.C. § 1211(g)).

139. *See*, *e.g.*, 10 C.F.R. 2.801-.809 (Nuclear Regulatory Commission, APA petition process); 10 C.F.R. §§ 430.41-.49 (Department of Energy regulations to implement 42 U.S.C. § 6297(b)); 47 C.F.R. §§ 1.46, 1.47-.48, 1.399-1.407 (Federal Communications Commission, APA petition process).

140. *See*, *e.g.*, Appendix A at notes 12-14, 52-55 *infra*.

141. 5 U.S.C. § 552(a)(1) ("separately state and currently publish in the Federal Register . . . descriptions . . ., statements . . ., instructions."). *See also* text at notes 76-80 *supra*.

142. *See*, *e.g.*, text at notes 774-80 *infra*.

143. *See* text at note 95 *supra*.

144. *See* text at notes 828-30 *infra*.

145. *See* text at notes 70-72 *supra*.

146. *Cf.*, *e.g.*, 1 C.F.R. § 305.71-3 (ACUS Recommendation No. 71-3, Articulation of Agency Policies).

147. *See* text preceeding note 99 *supra*.

148. *See* text at note 90 *supra*.

149. *See* text at note 734 *infra*.

150. *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE 206-09 (2d ed. 1978).

151. *But see* 16 U.S.C. § 1533(b) (1982).

152. *See* text at note 138 *supra*.

153. *See*, *e.g.*, text at notes 733-36 *infra*.

154. See, e.g., text following note 444 infra.

155. See text at notes 145-53 supra.

156. Where, for example, different parts of an agency administer programs of different sorts.

157. See text at notes 145-53 supra.

158. See, e.g., 21 C.F.R. § 10.30(k) (FDA).

159. See, e.g., 16 C.F.R. § 1051.5(a). But here the petitioner is required only to follow them "as closely as possible." Id. § 1051.1(b).

160. Id. §§ 1051.5(b), (c).

161. In fact, the CPSC was at one time so "receptive" to petitions that its power to control its regulatory agenda was seriously undermined. See text at note 855 infra.

162. See, e.g., 10 C.F.R. §§ 2.802-.803, 110.130-.132 (NRC); 43 C.F.R. §§ 14.-.4, 30 C.F.R. § 700.12 (Interior); 29 C.F.R. §§ 511.19, 516.10, 523.10, 1910.3 (Labor).

163. Id.

164. See, e.g., 29 C.F.R. §§ 3511.19, 516.10, 523.10, 530.13, 531.8, 536.4, 541.6, 545.12, 547.3, 548.5, 549.4, 550.3, 552.7, 570.27, 695.11 (Wage and Hour, Labor).

165. See text preceding note 170 infra.

166. See text following notes 139, 152 supra.

167. See 24 C.F.R. § 10.20.

168. See 24 C.F.R. § 1720.5.

169. Id.

170. See text following notes 139, 152 supra.

171. See, e.g., text at notes 728-91 (EPA) infra.

172. Id.

173. See, e.g., 16 C.F.R. § 1.21 (FTC).

174. See text at notes 96-98 infra. There are exceptions. See, e.g., 46 C.F.R. § 201.61 (Maritime Administration).

175. See 5 U.S.C. § 553(b)(A) (1982).

176. See text following note 150 supra.

177. See Appendix C infra.

178. See text at notes 180-796 infra.

179. See text at notes 854-934 infra.

180. It provided as follows:

QUESTIONNAIRE

Petitions for Rulemaking

> [For the purpose of the following questions, the terms "agency" and "rule" have the same meanings given to them by § 551 of the APA.]
>
> 1. Is your agency subject to any statutory requirement [other than the Administrative Procedure Act, §§ 553(e), 555(e)] that it receive and consider petitions for the issuance, amendment or repeal of a rule? If so, please cite the applicable statutory provision(s).
>
> 2. Has your agency adopted any regulations governing the receipt, consideration, and disposition of petitions for rulemaking? If so, please supply a citation to the regulations. If not, why not?
>
> 3. Does your agency have procedures for dealing with petitions for rulemaking that are described or elaborated in any other agency decisions, staff manuals, memoranda or other documents? If so, please supply a citation or a copy.
>
> 4. As a matter of statute, regulation or agency practice, does the process for the receipt, consideration, grant or denial of petitions vary depending on whether the petition is related to the (a) issuance, (b) amendment or (c) repeal of a rule? If so, how and why.
>
> 5. On the average, how many petitions for rulemaking are filed with your agency each year? How many are granted? How many are denied?
>
> 6. How many petitions for rulemaking are currently pending with your agency?

7. Does your agency have time limits applicable to the consideration and response to a petition? If so, what are they? Are they imposed by statute, regulation, or internal agency policy?

8. What is the average time for processing a petition from its filing to its grant or denial?

9. Does the agency publish petitions in the Federal Register? If some or all petitions are not published in the Federal Register, why not?

10. Does the agency compile a record in the petition proceeding? If not, why not? If so, what types of documents are included in the record? Are docket numbers assigned? If the petition is granted, do these materials become part of the rulemaking record for the rulemaking later commenced?

11. If a petition is denied, what steps does the agency take to inform the petitioner, other interested persons, and the public at large of the agency action? If granted, what steps are taken to inform them of the agency's action.

12. Are there any attorneys, law firms, persons or organizations that are particularly active in filing petitions with your agency? If so, what are their names and addresses, if known?

13. Please give the names and telephone numbers of agency employees who are particularly familiar with your petition process.

181. Board of Governors of the Federal Reserve System

Office of Personnel Management

Postal Rate Commission

U.S. Postal Service

Department of Agriculture

Department of Housing and Urban Development

Immigration and Naturalization Service

Bureau of Prisons

Department of Labor

Office of the Comptroller of the Currency

U.S. Customs Service

National Oceanic and Atmospheric Administration (Department of Commerce)

Department of Defense

Department of Education

Health Care Financing and Human Development Services Division (HSS)

Social Security Adminstration (HHS)

Federal Election Commission

Federal Home Loan Bank Board

Veterans Administration

Federal Labor Relations Authority

Nuclear Regulatory Commission

Department of Energy

National Aeronautics and Space Administration

Federal Aviation Administration (DOT)

International Trade Administration (Department of Commerce)

Federal Trade Commission

Consumer Product Safety Commission

Commodity Futures Trading Commission

Securities & Exchange Commission

Federal Energy Regulatory Commission

Food & Drug Administration (HHS)

Drug Enforcement Administration (Department of Justice)

Internal Revenue Service

Foreign Service Labor Relations Board

Bureau of Alcohol, Tobacco and Firearms (Treasury)

National Mediation Board

Equal Employment Opportunity Commission

National Labor Relations Board

U.S. Coast Guard (DOT)

Environmental Protection Agency

Department of the Interior

Federal Emergency Management Agency

Maritime Administration (DOT)

Federal Maritime Commission

Federal Communications Commission

Research & Special Programs Administration (DOT)

Federal Railroad Administration

Federal Highway Administration (DOT)

National Highway Traffic Safety Administration (DOT)

Interstate Commerce Commission

National Credit Union Administration

182. Responses were not received from the Federal Reserve System, Office of Personnel Management, Research & Special Programs Administration, National Mediation Board, and the Drug Enforcement Administration.

183. They included the following: U.S. Customs Service, U.S. Postal Service, Social Security Administration, Comptroller of the Currency, Federal Home Loan Bank Board (but cf. 12 C.F.R. § 508.13), Immigration and Naturalization Service, Veterans Administration, Coast Guard (but cf. 33 C.F.R. 1.05-1), Health Care Financing, Federal Election Commission, Department of Education, Federal Prison System, and the Postal Rate Commission. NASA has none but is not a "regulatory agency." Letter from John E. O'Brien, General Counsel, National Aeronautics and Space Administration to author (July 23, 1986).

Many agencies have implemented the Equal Access to Justice Act by adopting rules which expressly provide for petitions for rulemaking to increase the rate for attorney fees. See, e.g., 29 C.F.R. § 102.146 (NLRB). This study did not focus on these rules or the practices thereunder.

184. 5 U.S.C. § 553(a) (1982).

185. See, e.g., Letter of Richard V. Fitzgerald, Chief Counsel, Office of the Comptroller of the Currency to author (June 6, 1986).

186. See, e.g., Letter of Maurice C. Inman, Jr., General Counsel, Immigration and Naturalization Service to author (June 6, 1986).

187. Id. See also questionnaire response under cover letter of Ralph W. Christy, Deputy Chief Counsel, Federal Home Loan Bank Board to author (June 5, 1986).

188. Questionnaire response under cover letter of Charles N. Steele, General Counsel, Federal Election Commission to author (June 3, 1986).

189. See, e.g., 49 C.F.R. §§ 211.11, .3, .5, .7, .9, .11, .13 (FRA). The FRA reported few formal petition filings. See Letter of Michael T. Haley, Deputy Chief Counsel, Federal Railroad Administration to author (Sept. 11, 1986).

190. See 29 C.F.R. §§ 102.123-.125.

191. Letter of Rosemary M. Collyer, General Counsel, National Labor Relations Board to author (June 10, 1986).

192. See, e.g., 30 C.F.R. § 700.12 (Surface Mining Reclamation and Enforcement).

193. See, e.g., FERC, Guide to Basic Rulemaking at the Federal Energy Regulatory Commission § 5.1-5.2 (Spring 1986); Federal Maritime Commission Order No. 99 (June 27, 1980); National Oceanic and Atmosphere Administration Directives Manual, Chapter 21-24, § 14 (June 1, 1979).

194. Id.

195. See, e.g., Department of Agriculture, Food Safety and Inspection Service Directive 1232.2 (May 14, 1986); National Highway Traffic Safety Administration Orders 800-1 (Feb. 2, 1977), 800-2 (Nov. 20, 1978); 800-3 (July 26, 1983).

196. See, e.g., questionnaire response with cover letter from Charles N. Steele, General Counsel, Federal Election Commission to author (June 3, 1986); Letter of Timothy Keener, Deputy General Counsel, National Oceanic and

Atmospheric Administration to author (June 2, 1986) (referring to NOAA Directives Manual, Chap. 21-24, § 14).

197. See text at notes 15-22 supra.

198. The FDA's records regarding citizen petitions do not separate petitions for rulemaking from other types of citizen petitions. See questionnaire response under cover letter from Linda R. Horton, Deputy Chief Counsel for Regulations and Hearings, FDA to author (Aug. 21, 1986). The total quoted in the text includes 62 food additive petitions and 100 color additive petitions received by FDA in 1985. Letter from Linda R. Horton, Deputy Chief Counsel for Regulations and Hearings to Michael W. Bowers, ACUS (Oct. 28, 1986).

199. This number includes an average of 3 petitions under the Toxic Substances Control Act, 100 petitions for tolerances under the Federal Food, Drug, and Cosmetic Act, 2 petitions under the Clean Water and Safe Drinking Water Acts and over 100 delisting petitions under the Resource Conservation and Recovery Act. See questionnaire response under cover letter from Gerald H. Yamada, Deputy General Counsel, U.S. EPA to author (Aug. 29, 1986).

200. Letter from Jack D. Smith, General Counsel, Federal Communications Commission to author (June 13, 1986). To an unknown extent, some of these petitions are of a very specialized variety. Interview with June Stewart, Office of General Counsel, FCC on July 2, 1986.

201. Questionnaire response under cover letter from Erika Z. Jones, Chief Counsel, National Highway Traffic Safety Administration to author (June 6, 1986).

202. Letter from Jane F. Mackall, Director, Office of Proceedings, Interstate Commerce Commission to author (May 23, 1986). The figure represents the average number of rulemakings instituted each year but available records do not disclose how many of these are traceable to petitions. Id.

203. This number largely represents the average number of petitions filed under 42 U.S.C. § 6297(b) (1982). See Appendix A at notes 1-6 infra. See questionnaire response under cover letter from Stanford O. Bardwell, Jr., Deputy General Counsel, Legislation and Regulations, Department of Energy to author (Sept. 26, 1986).

204. Letter from E. Tazewell Ellett, Chief Counsel, Federal Aviation Administration to author (June 9, 1986).

205. Questionnaire response under cover letter from Ralph W. Tarr, Solicitor, Department of the Interior to author (June 11, 1986).

206. Letter from Anthony J. McMahon, Chief Counsel, Federal Highway Administration to author (June 5, 1986).

207. Letter from Marvin J. Dessler, Chief Counsel, Bureau of Alcohol, Tobacco and Fireams, Department of the Treasury to author (Oct. 27, 1986). This number represents 5 petitions for designations of viticultural areas and seven petitions related to tax matters, all filed in 1986.

208. Questionnaire response under cover letter from William H. Satterfield, General Counsel, Federal Energy Regulatory Commission to author (June 13, 1986).

209. Questionnaire response under cover letter from Donald L. Ivers, General Counsel, Veterans Administration to author (June 6, 1986). This number represents "informal submissions," treated as correspondence, which suggest rule changes. Id.

210. Questionnaire response under cover letter from Robert L. Broussand, Office of the General Counsel, Department of Agriculture to author (no date).

It should be noted that various parts of the Department of Agriculture receive petitions for rulemaking, though they may be of a specialized sort which were not the focus of this study. Since the statistics quoted in the text with regard to other agencies may include specialized rulemaking petitions in some cases, for comparison purposes a more accurate picture requires listing of at least some of the other petition activity in the Department of Agriculture:

6 -- Animal and Plant Health Inspection Service--Veterinary Services

8 -- Animal and Plant Health Inspection Service--Plant Quarantine

256 -- Agricultural Marketing Service

150 -- Federal Grain Inspection Service

211. Questionnaire response under cover letter from Stephen Lemberg, Assistant General Counsel, Consumer Product Safety Commission to author (June 4, 1986).

212. Questionnaire response under cover letter from Martin G. Malsch, Acting General Counsel, Nuclear Regulatory Commission to author (June 26, 1986).

213. Questionnaire response transmitted under cover memorandum from Marshall A. Deutsch, Department of Labor to author (Sept. 17, 1986).

214. Questionnaire response under cover letter from Kenneth M. Raisler, General Counsel, Commodity Futures Trading Commission to author (June 6, 1986).

214a. A survey conducted by Friends of the Earth in 1978 indicated a similar lack of significant petition activity. See Ortman, A Report to the Committee on Rulemaking of the ACUS on Procedures in Informal Rulemaking in Addition to Those Now Required by 5 U.S.C. § 553 (1982).

215. Telephone interview with Mark Silbergeld, Consumers Union on July 22, 1986.

216. Interview with Alan Stephens, Regional Airline Association on August 12, 1986.

217. Id.

218. Telephone interview with Howard Fox, Sierra Club Legal Defense Fund on July 21, 1986.

219. See text at notes 677-85 infra.

220. See Appendix A at notes 27-43 infra.

221. See, e.g., 21 C.F.R. Part 171 (food additive petitions). The discussion that follows does not include food additive, color additive, or other specialized types of petition procedures.

222. See 21 C.F.R. § 10.30(a).

223. Id. §§ 10.20, 10.30, 10.33.

224. 21 C.F.R. § 10.25(a).

225. See 21 C.F.R. § 10.30(b).

226. Interview with Linda R. Horton, Deputy Chief Counsel for Regulations and Hearings and Catherine Lorraine, Associate Chief Counsel for Enforcement, Food and Drug Administration, Department of Health and Human Services, July 7, 1986 [hereinafter "Horton Interview"]; Interview with Robert Spencer, Director, Division of Regulatory Policy, Food and Administration on June 30, 1986 [hereinafter "Spencer Interview"]. See also 21 C.F.R. § 10.3 ("interested person" means a person who submits a petition).

227. Id. § 10.20(f).

228. Id. §§ 10.20, 10.30(b).

229. Id. § 10.30(b).

230. Id.

231. Id. FDA officials interviewed have rarely seen unfavorable information, designated as such, in a petition. Interview with Philip B. White, Director, and Joseph Sheehan, Regulations Staff, Office of Standards and Regulations, Center for Devices and Radiological Health, FDA on June 30, 1986 [hereinafter "White Interview"]; Interview with L. Robert Lake, Acting Director, Office of Compliance, Center for Food Safety and Applied Nutrition on July 7, 1986) [hereinafter "Lake Interview"].

232. 21 C.F.R. § 10.30(b).

233. Id. § 10.20(b).

234. Id. § 10.20(b).

235. Id. § 10.20(c)(6). See also 21 C.F.R. § 20.44.

236. Id. §§ 10.20(c)(6); 10.20(d); 10.30(c).

237. Id. § 10.20(c)(6).

238. Interview with Albert Rothschild, Director, Division of Regulatory Affairs, and Steven Unger, Regulatory Counsel, Center for Drugs & Biologics on July 1, 1986 [hereinafter "Rothschild Interview"].

239. Interview with Linda Quinones, Chief, and Jennie Butler, Deputy Chief, Dockets Management Branch Food and Drug Administration on June 30, 1986 [hereinafter "Quinones Interview"] (certification paragraph required by 21 C.F.R. § 10.30(b)).

240. 21 C.F.R. § 10.30(k).

241. 21 C.F.R. § 10.30(c).

242. Id.

243. Id. § 10.20(j). That regulation does not expressly open up the remainder of the file to the public, though the file in practice seems generally to be open.

244. Id. § 10.30(c).

245. 21 C.F.R. § 10.30(l).

246. Quinones Interview.

247. Spencer Interview.

248. Spencer Interview; White Interview; Rothschild Interview; Lake Interview; Interview with Robert Brigham, Chief, Petitions and Regulations Branch, Center for Veterinary Medicine on July 1, 1986 [hereinafter "Brigham Interview"].

249. White Interview; Brigham Interview.

250. See, e.g., Appendix A at notes 29-31 infra.

251. 21 C.F.R. § 10.30(e)(2).

252. Id. (e)(2)(iii).

253. See also 21 C.F.R. § 5.31(e). See also Spencer Interview.

254. Brigham Interview.

255. White Interview.

256. Rothschild, Brigham and Lake Interviews.

257. 21 C.F.R. § 10.30(d).

258. Id.

259. Quinones Interview.

260. See 21 C.F.R. § 10.30(h)(3). See also id. § 10.40(a)(4).

261. Horton, Spencer, Lake, White and Brigham Interviews.

262. Telephone Interview with Linda R. Horton, Deputy Chief Counsel for Regulations and Hearings, FDA, on October 31, 1986 (hereinafter "Horton Telephone Interview").

263. See 5 U.S.C. § 553(c), 553(e) (1982).

264. White and Brigham Interviews.

265. White Interview. See, e.g., 51 F.R. 11266 (April 1, 1986) (notice of filing citizen petition).

266. Id.

267. Brigham Interview.

268. See 21 C.F.R. § 10.30(h).

269. 21 C.F.R. § 10.30(h)(1).

270. Spencer Interview. See 21 C.F.R. § 5.20(b) (Deputy Commissioner and Associate Commissioner for Regulatory Affairs are authorized to perform all the functions of the FDA Commissioner).

271. 21 C.F.R. § 10.30(e)(2)(i). The regulations specify generally the pre-conditions for issuing a notice of proposed rule-making reflecting a proposal of a petitioner. See 21 C.F.R. § 10.40(a)(2).

272. Spencer Interview. See also 21 C.F.R. §§ 10.30(e)(2)(ii), (e)(3). But see 21 C.F.R. § 5.31(f).

273. Id. § 10.30(e)(1)(i).

274. Id. § 10.30(e)(1)(ii).

275. Id. § 10.30(e)(1)(iii).

276. Id. § 10.30(j).

277. Id. § 10.30(i).

278. Id. § 10.30(i)(5).

279. White, Brigham, and Lake Interviews.

280. Lake, White, Rothschild Interviews.

281. 21 C.F.R. § 10.40(g)(1).

282. 21 C.F.R. § 10.30(e)(3).

283. Rothschild Interview.

284. 21 C.F.R. § 10.30(e)(3).

285. Id. § 10.33(b).

286. Id. § 10.33(e).

287. Id. (b), (c).

288. See note 198 supra.

289. Questionnaire response under cover letter from Linda R. Horton, Deputy Chief Counsel for Regulations and Hearings, FDA to author (Aug. 21, 1986).

290. Brigham, Lake and Rothschild Interviews.

291. Rothschild Interview.

292. Spencer and Lake Interviews.

293. White Interview.

294. Id.

295. Brigham Interview.

296. Horton Interview.

297. Horton Telephone Interview, Spencer, White and Brigham Interviews.

298. 5 U.S.C. § 553(e) (1982).

299. 47 C.F.R. § 1.401(a). FCC officials suggested that these petition regulations apply to both legislative and procedural rules as well as general statements of policy. See Interview with Jack D. Smith, General Counsel, Federal Communications Commission on July 2, 1986 [hereinafter "Smith Interview"]; Interview with Martin Blumenthal, Assitant General Counsel, FCC on July 3, 1986 [hereinafter "Blumenthal Interview"].

300. See text at notes 224-26 supra.

301. Interview with Charles G. Schott, Chief; Ralph Haller, Deputy Chief and Robert Ratcliffe, Assistant Chief, Policy and Rules Division, Mass Media Bureau, FCC on July 2, 1986 [hereinafter "Schott Interview"].

302. Letter from Susan H. Steinman, Associate General Counsel, FCC to author (Nov. 5, 1986). See also text at note 88a supra.

303. 49 C.F.R. § 1.401(b).

304. Id. § 1.49.

305. Id. § 1.52.

306. Id. § 1.419(b).

307. Id. § 1.401(b).

308. Id. § 1.401(c). Certain petitions must be served on licensees or permittees whose channel assignments would be affected by rule changes. Id. (d).

310. Interview with William Tricarico, Secretary of the Commission, Office of Managing Director, FCC on July 3, 1986 [hereinafter "Tricarico Interview"]. A stamped "receipted" copy of the petition may be given if requested by the petitioner.

311. See 47 C.F.R. § 0.5(b)(4).

312. See generally id. §§ 0.61, 0.91, 0.131 for a description of their specific functions.

313. Schott Interview.

314. Id.; Interview with Robert Unger, Attorney Advisor, Office of Engineering and Technology, FCC on July 3, 1986 [hereinafter "Unger Interview"].

315. 47 C.F.R. § 1.401(e). See also id. § 0.251(d) (authority to so dismiss delegated to General Counsel).

316. Blumenthal Interview; Interview with Frederick Day, Chief, Rules Branch, Private Radio Bureau, FCC on July 3, 1986 [hereinafter "Day Interview"].

317. Interview with Joyce Butler, Chief, Dockets Branch, Office of Managing Director, FCC on July 3, 1986 [hereinafter "Butler Interview"].

318. 47 C.F.R. § 1.429(a).

319. Id. § 1.429. See text at notes 377-84 infra.

320. Tricarico Interview.

321. Butler Interview.

322. Id.

323. Id.

324. Tricarico Interview.

325. Id.

326. Id.

327. Butler and Tricarico Interviews.

328. See 47 C.F.R. § 1.403.

329. Tricarico Interview.

330. Id.

331. Id.

332. Butler Interview.

333. 47 C.F.R. § 1.403 (not applicable to petitions to amend the FM, Television and Air-Ground Tables of Assignments).

334. Id. § 1.403.

335. See 47 C.F.R. § 0.443.

336. $134.00 per typewritten page. Blumenthal Interview; Interview with Ron Jackson, Public Relations Liaison for the

Federal Register, Office of Managing Director, FCC on July 2, 1986.

337. 47 C.F.R. § 1.405(a).

338. Tricarico Interview.

339. 47 C.F.R. § 1.405(a), which proof must comply with *id.* § 1.47.

340. *Id.* § 1.405(a).

341. *Id.* § 1.405(b).

342. *Id.* § 1.405(b).

344. Unger Interview. Of course, even where the comment process is one-stage, there could be a provision for extension of the comment period to take care of this problem.

345. Day and Unger Interviews.

346. *Id.*

347. Unger Interview.

348. Unger Interview.

349. *See* text at notes 304-08 *supra*.

350. Schott Interview.

351. *See* text at notes 159-61 *supra*.

352. Schott Interview.

353. Unger Interview; Day Interview. *See generally* 47 C.F.R. § 1.1.

354. *See* 47 C.F.R. § 1.430.

355. Unger and Day Interviews.

356. 47 C.F.R. § 1.405(d).

357. *See* 47 U.S.C. § 157(b) (1982) (petitions for proposed new technologies or services).

358. Letter from Jack D. Smith, General Counsel, FCC to author (June 13, 1986) [hereinafter "Smith Letter"].

359. *Id.*; Schott Interview.

360. *Id.*

360a. Telephone Interview with William Tricarico, Secretary of the Commission on November 5, 1986.

361. Unger and Day Interviews.

362. Schott and Unger Interviews.

363. Tricarico Interview.

364. Tricarico Interview.

365. Smith Letter.

366. Id. See also 47 C.F.R. § 1.407.

367. Butler Interview.

368. Smith Letter.

369. Butler Interview.

370. 47 C.F.R. § 1.407.

371. Unger Interview.

372. See, e.g., text at notes 501-04 infra.

373. Smith Letter.

374. Schott Interview.

375. Id.

376. Smith Letter.

377. 47 C.F.R. § 1.429(a).

378. Id.

379. Id. § 1.429(b).

380. Id. § 1.429(e).

381. Id. § 1.429(f).

382. Id. § 1.429(g).

383. Id. § 1.429(i).

384. Id. § 1.429(a).

385. Smith Letter.

386. Id.

387. Id.

388. Unger Interview.

389. Unger and Day Interviews.

390. Unger Interview.

391. Blumenthal Interview.

392. Unger and Day Interviews.

393. See text at notes 360-61 supra.

394. 18 C.F.R. § 2.1a(a).

395. Id. Part 385. See also id. § 385.101.

396. Id. § 385.207(a)(4).

397. Id. § 385.202.

398. See id. § 385.203. See also id. § 385.201.

399. Id. §§ 385.203(a) (2), (3), (6), (b)(1).

400. Id. § 385.2001(a).

401. Id. § 385.2002(d).

402. Id. § 385.2003(a).

403. Id. § 385.2003(b).

404. Id. § 385.2003(c).

405. Id. § 385.2004.

406. Id. § 385.2005(a).

407. Id. § 385.2001(b)(1).

408. Id. § 385.2001(b)(3).

409. Id. § 385.2006(a).

410. Questionnaire response under cover letter from William H. Satterfield, General Counsel, Federal Energy Regulatory Commission to author (June 13, 1986) (hereinafter "FERC Ques. Response").

411. Id.

412. Id.

413. *Id.*

414. Interview with Joseph Hartsoe, Attorney, Rulemaking and Legislative Analysis Division, Office of General Counsel, FERC on July 11, 1986 (hereinafter "Hartsoe Interview.").

415. FERC Ques. Response.

416. Hartsoe Interview.

417. 18 C.F.R. § 385.213(a)(3).

418. *Id.* § 385.213(c).

419. *Id.* § 385.2003(a). *See also id.* § 385.2001(a)(1).

420. *Id.* § 385.2003(b).

421. *Id.* § 385.2003(c).

422. *Id.* § 385.2004.

423. *Id.* § 385.2005(a).

424. *Id.* § 385.2010(a),(c).

425. Hartsoe Interview.

426. 18 C.F.R. § 385.213(d)(2)(ii).

427. *Id.* § 388.105(a)(1)(i), (ii).

428. Division of Rulemaking and Legislative Analysis (Office of General Counsel, FERC), *Guide to Basic Rulemaking at the Federal Energy Regulation Commission* (Spring 1986) (hereinafter "FERC Guide") at § 5.1.

429. FERC Ques. Response.

430. *Id.*

431. *Id.* *See* 15 U.S.C. § 717r; 16 U.S.C. § 825l(b) (1982).

432. FERC Ques. Response.

433. *Id.*; Hartsoe Interview.

434. FERC Ques. Response. This assumes that the proposed rule is not within 5 U.S.C. § 553(b)(A),(B) (1982) and the FERC decides not to go through the NPRM stage. *Id.*

435. Telephone interview with Joseph Hartsoe, FERC Attorney, on Sept. 29, 1986.

436. Hartsoe Interview.

437. FERC Ques. Response; FERC Guide.

438. Hartsoe Interview.

439. FERC Ques. Response.

440. Id.

441. Telephone interview with Joseph Hartsoe, FERC Attorney, on Sept. 29, 1986.

442. See text at note 219 supra.

443. Hartsoe Interview.

444. Id.

445. Id.

446. FERC Ques. Response.

447. Hartsoe Interview.

448. 18 C.F.R. § 385.2001(b)(3).

449. See, e.g., 18 C.F.R. § 385.217 (summary disposition).

450. See 18 C.F.R. § 385.1901(i).

451. See id. § 385.1404.

452. Id. (no reply to petition may be filed).

453. Questionnaire response under cover letter from Marcy J.K. Tiffany, Acting General Counsel, Federal Trade Commission to author (July 3, 1986) (hereinafter "FTC Response"). But cf. 15 U.S.C. 57a(g) (petitions for exemption treated as rulemaking).

454. Interview with Benjamin I. Berman, Attorney Advisor, Office of the Secretary; Teresa Hennessy, Office of General Counsel; John Nash, Assistant Director for Rulemaking, Division of Policy and Evaluation, Bureau of Consumer Protection; Reid Horwitz, Assistant to the Director, Bureau of Consumer Protection; Lawrence Demille-Wagman, Attorney, Office of General Counsel, Federal Trade Commission on July 8, 1986 (hereinafter "Berman Interview"). The views expressed in this interview were "solely those of the participants and not those of the Commission or any of the Commissioners." Letter of Teresa A. Hennessy, Attorney, Office of General Counsel, FTC to author (Nov. 6, 1986) (hereinafter "Hennessy Letter").

455. Id.

456. Id.

457. See 15 U.S.C. § 57a(a)(1)(B) (1982).

458. 16 C.F.R. § 1.9.

459. Id.; Berman Interview.

460. 16 C.F.R. § 1.9.

461. Berman Interview. See 16 C.F.R. §§ 4.2-4.4.

462. Berman Interview.

463. FTC Response.

464. Berman Interview; FTC Response. See also 16 C.F.R. § 4.9(b)(3).

465. Berman Interview. It is, of course, the Bureau Director that must ultimately sign off on recommendations to the full Commission.

466. FTC Response.

467. Id.; FTC Response.

468. Berman Interview

469. FTC Operating Manual 7.3.3. See also FTC Response; Berman Interview; Letter from Teresa Hennessy, Attorney, Office of General Counsel, FTC to author (Sept. 17, 1986).

470. FTC Operating Manual 7.3.3:

> (1) Whether the determination to issue the rule sought as the ultimate result of the petition would be within the Commission's jurisdiction.
>
> (2) Whether issuance of the rule sought appears likely, insofar as can be determined before conducting a rulemaking proceeding, to have more or greater beneficial than detrimental effects, and otherwise to be in the public interest.
>
> (3) Whether the rule sought could, if issued, be enforced to the extent necessary to realize its intended benefits, taking into consideration the Commission's

> resources and other duties and commitments.
>
> (4) Whether the effort required to conduct the requested rulemaking proceeding would be consistent with the Commission's resources and other duties and commitments.
>
> (5) Whether the investigation and analytical effort required to answer questions (1) through (4) would be consistent with the Commission's resources and other duties and commitments, and the necessity for an expeditious response to the petition.

471. Berman Interview.

472. *Id.*

473. *Id.*

474. *See* text at notes 323-26 *supra*.

475. Berman Interview.

476. *See* text at notes 313-20 *supra*.

477. Berman Interview.

478. Berman Interview.

479. Berman Interview.

480. Berman Interview.

481. *See* 15 U.S.C. § 57a(b)(2)(A) (1982).

482. *Id.* § 57a(b)(2)(A)(i), (ii).

483. Berman Interview.

484. 15 U.S.C. 57(b)(2)(B).

485. 16 C.F.R. § 1.9.

486. Berman Interview.

487. *Id.*

488. *Id.*

489. *Id.*

490. FTC Operating Manual § 7.3.2.

491. Id.

492. 16 C.F.R. § 1.11(a).

493. Id. § 1.12.

494. Id. § 1.14.

495. Id. § 1.9.

496. FTC Response.

497. Id. § 1.9.

498. Id. § 1.9; Berman Interview.

499. Berman Interview.

500. Id.

501. Hennessy Letter.

502. See 5 U.S.C. § 555(b) (1982).

503. See id. § 555(e).

504. Id. (b).

505. See 15 U.S.C. § 57a(b)(2)(B). See also 15 C.F.R. § 1.10(d).

506. See 16 C.F.R. § 1.20.

507. Id. § 1.9.

508. See 15 U.S.C. § 57a(a)(2), (b). See also FTC Operating Manual at 7.2.3.1.

509. By its terms § 57a(b) applies only to trade regulation rules described in § 57a(a)(1)(B), not interpretative rules and general statements of policy referred to in § 57a(a)(1)(A).

510. See 16 C.F.R. §§ 1.7, 1.21; Berman Interview.

511. Berman Interview.

513. FTC Operating Manual at 7.33; Berman Interview.

514. 16 C.F.R. § 1.21, 1.25.

515. A copy of the notice of proposed rulemaking must be given to the petitioner. See 16 C.F.R. § 1.26(b).

516. *Id.* § 1.25.

517. *See* text at notes 481-84 *supra*.

518. *Id.* § 1.21.

519. *Id.* § 1.25.

520. *See* text at notes 96-98 *supra*.

521. *See* 15 U.S.C. § 1681 *et seq.* (1982).

522. *See* 16 C.F.R. § 1.73(a)(2), (c).

523. *Id.* § 1.73(b).

524. *See* note 526 *infra*.

525. *See* text at notes 514-16 *supra*.

526. *See*, *e.g.*, text following note 179 *supra*. It should be noted that 16 C.F.R. § 1.21 does not expressly exempt interpretative rules from the coverage of § 1.25. If no exemption was intended, a clearer statement of inclusion would be desirable. If exemption was intended, clarity of statement is still lacking here.

527. FTC Response.

528. *Id.*

529. *Id.*

530. *See*, *e.g.*, 15 U.S.C. § 57a(i) (1982) (children's advertising).

531. *See* text at notes 298-384 *supra*.

532. *See*, *e.g.*, NHTSA Order 800-2, Attachment 1, p. 2 (Nov. 20, 1978).

533. Interview with Barry Felrice, Associate Administrator for Rulemaking, National Highway Traffic Safety Administration on July 9, 1986 (hereinafter "Felrice Interview). *See also* NHTSA Order 800-1 (Rulemaking Procedures) (Feb. 2, 1977).

534. Felrice Interview.

535. *Id.*

536. *Id.* *See* NHTSA Order 800-2 (Nov. 20, 1978).

537. Felrice Interview. *See* NHTSA Order 800-3 (July 26, 1983).

538. See 15 U.S.C. § 1381 et seq. (1982).

539. Id. § 1410a.

540. Id.

541. Id. (d) (120 days).

542. The regulations and some of the internal orders also apply to petitions submitted under other statutes, including the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. 1901 et seq. (1982). See 49 C.F.R. § 552.1 and NHTSA Order 800-2 (Nov. 20, 1978). The focus in the text, however, is on petitions to establish motor vehicle safety standards.

543. See Appendix A at notes 68-73 infra.

544. 49 C.F.R. § 551.31.

545. Id. § 551.33.

546. Id. § 551.35.

547. Id. § 551.37.

548. Id. § 551.1.

549. See id. §§ 552.1-552.10.

550. Id. § 552.4.

551. Id.

552. Id. § 552.5(a).

553. Id. (b).

554. NHTSA Order 800-2 at p. 4.

555. Id. Attachment 1 at p. 1.

556. Id.

557. NHTSA Order 800-2 at p. 4.

558. Id.

559. Id. Attachment 1 at p. 1.

560. Questionnaire Response order cover letter from Erika Z. Jones, Chief Counsel, NHTSA to author, June 6, 1986 (hereinafter "NHTSA Response"). See also 49 C.F.R. § 553.5(a).

561. NHTSA Order 800-3 at pp. 1-2.

562. Id. at 2.

563. NHTSA Order 800-2, Attachment 1 at p. 1. See also 49 C.F.R. § 552.6.

564. NHTSA Response.

565. Felrice Interview.

566. Id.

567. Id.

568. Id.

569. Id.

570. Id.

571. Id.

572. Id.

573. Id.

574. NHSTA Response.

575. Felrice Interview.

576. See 49 C.F.R. § 552.7.

577. NHTSA Order 800-2, Attachment 1 at p. 1.

578. 49 C.F.R. § 552.7.

579. Id.

580. NHTSA Order 800-2, Attachment 1 at p. 1.

581. Id.

582. Id., Attachment 1 at p. 2.

583. Id.

584. See 15 U.S.C. § 1410a(a) (1982).

585. Id. § 1410a(d).

586. See text at notes 59-69 supra.

587. Felrice Interview.

588. See 49 C.F.R. § 552.8.

589. See 15 U.S.C. § 1410a(d) (1982).

590. APA Section 555(b) provides in part that "within a reasonable time, each agency shall proceed to conclude a matter presented to it." 5 U.S.C. § 555(b) (1982) (emphasis added). If, for example, an agency initiates a rule-making on its own, it is arguable that this provision is inapplicable since no one outside the agency has "presented it" with a matter for disposition. While reviewing courts are directed to "compel agency action unlawfully withheld or unreasonably delayed," id. § 706(1), arguably this power attaches only in those cases covered by § 555(b) or other statutes imposing duties to act or act within a designated time frame. One court noted that Section 706(1) "complements" Section 555(b), which language can be taken to support this position. See Public Citizen Health Research Group v. Auchter, 702 F.2d 1150, 1153-54 (D.C. Cir. 1983). But cf. In re Center for Auto Safety, ___ F.2d ___, 63 Ad. L. 2d 680, 689 (D.C. Cir. 1986) (where the court seemed to view § 555(b) as applicable even to rulemaking not commenced in response to a petition though there was an express statutory deadline involved there); Oil, Chemical & Atomic Workers International Union v. Zeygeer, 768 F.2d 1480 (D.C. Cir. 1985) (where court reviewed alleged unreasonable delay in a rulemaking commenced in part on the initiative of the agency). See generally LEGISLATIVE HISTORY at 205 264; ATTORNEY GENERAL'S MANUAL at 157.

If in fact the courts' power under APA Section 706(1) is limited to enforcing time limits for agency action under Section 555(b) and other statutes and if a "grant" of a petition for a motor vehicle standard is considered to "conclude" the "matter presented to the agency," delay in any rulemaking started by the agency is not subject to judicial correction, at least under Section 706(1), though perhaps it might be considered "arbitrary, capricious" or an "abuse of discretion" under Section 706(2)(A).

Where a statutory "grant" of a petition precedes the rulemaking, as in the case of 15 U.S.C. § 1410a (1982), it might be argued that this affirmative disposition does not really "conclude" the matter presented since it suggests that the agency will take steps in the direction of adopting a rule. If correct, of course, this argument means that the agency is arguably under the duty imposed by Section 555(b) to act with reasonable promptitude, though it is still doubtful that a termination of the rulemaking without the adoption of petitioner's proposed rule triggers Section 555(e).

APA Section 553(e), interpreted in the manner proposed by this report, see text at notes 59-69 supra, obviates the need to grapple with these interpretative problems and, in part, this is one of the strongest practical reasons in favor of considering the grant of an APA petition to occur only at the point when a rule is finally issued, amended or repealed.

591. See 49 C.F.R. § 552.9(a).

592. NHTSA Order 800-3 at p. 3.

593. Id. Exhibit 1.

594. NHTSA Order 800-3 at p. 3. See also id. Exhibit 2.

595. Id.

596. 15 U.S.C. § 1410a(d) (1982).

597. Id.

598. 49 C.F.R. § 552.9.

599. Id. § 552.10.

600. NHTSA Response.

601. Felrice Interview.

602. See 49 C.F.R. §§ 553.35-.39 and Appendix thereto.

603. Felrice Interview.

604. Id.

605. NHTSA Order 800-3 at p. 6.

606. Id.

607. Id.

608. Felrice Interview.

609. Id.

610. Id. See NHTSA Order 800-3 at p. 5 (disagreements can justify delay in time period).

611. Felrice Interview.

612. Id.

613. NHTSA Response.

614. Felrice Interview.

615. Id.

616. Id.

617. Id.

618. NHTSA Response.

619. Id.

620. Id.

621. Id.

622. Questionnaire Response under cover letter from Martin G. Malsch, Acting General Counsel, United States Nuclear Regulatory Commission to author, dated June 26, 1986 (hereinafter "NRC Response").

623. See, e.g., 10 C.F.R. §§ 2.801-.803.

624. See, e.g., Memorandum from Victor Stello, Jr., Executive Director for Operations, NRC regarding Timely Resolution of Petitions for Rulemaking (PRM) (Aug. 13, 1986) (hereinafter "Stello Memorandum").

625. See NRC Regulations Handbook (NUREG/BR 0053, Part 11) (Sept. 1985) (hereinafter "NRC Handbook"). See also Commission Paper SECY-77-526 (Oct. 7, 1977).

625a. 42 U.S.C. § 4331 et seq. (1982).

626. 10 C.F.R. Part 2, Subpart H.

627. See also 10 C.F.R. §§ 110.130-.132 (regulations with respect to petitions for rulemaking with regard to export and import of nuclear equipment and material).

628. 10 C.F.R. § 2.802(b).

629. NRC Handbook at p. 201.

630. 10 C.F.R. § 2.802(a).

631. NCR Handbook at p. 201.

632. 10 C.F.R. § 2.802(c).

633. See 10 C.F.R. §§ 51.22, .40, .41, .45, .68, .74, .93, .94, .102, .103.

634. Id. § 51.41.

635. Id. § 51.45.

636. Id. §§ 51.74, 51.93

637. Id. § 51.94.

638. NCR Handbook at 202.

639. Id. at p. 204.

640. Id. See also 10 C.F.R. 2.802(f).

641. NRC Handbook at p. 204.

642. Id.

643. Id. See also 10 C.F.R. § 2.802(f).

644. NRC Handbook at p. 204; 10 C.F.R. § 2.802(f).

645. NRC Handbook at p. 204.

646. Id. at p. 203.

647. See 10 C.F.R. § 2.802(e).

648. NRC Handbook at p. 203.

649. Id. at p. 205.

650. Id.

651. To the extent an NPRM is published for these, the agency is affording more than APA Section 553 mandates. See 5 U.S.C. § 553(b)(A) (1982).

652. NRC Handbook at pp. 205-6.

653. Id. at pp. 206-7.

654. Id. at pp. 205, 207.

655. Id. at p. 208.

656. Id.

657. Id. at p. 210.

658. Interview with John Philips, Chief, Rules and Procedures Branch, and Michael Lesar, Regulations Specialist, Division of Rules and Records, Office of Administration, U.S. Nuclear Regulatory Commission on July 11, 1986 (hereinafter "Philips Interview").

659. Letter from John Philips, Chief, Rules and Procedures Branch, Division of Rules and Records, Office of Administration, NRC, to author (October 15, 1986) (hereinafter "Philips Letter").

660. NRC Handbook at p. 209.

661. Id.

662. See 10 C.F.R. § 2.802(e).

663. NRC Handbook at p. 209. Philips Interview.

664. See note 697 infra.

665. NRC Handbook at p. 209.

666. Id. at p. 209.

667. Philips Letter.

668. Id. at p. 210.

669. Id. at p. 211.

670. Philips Letter.

671. Id.

672. Id.

673. Id. at 213.

674. Id.

675. Philips Letter.

676. Id. See also 10 C.F.R. § 2.803.

677. 10 C.F.R. § 1.40(o).

678. NRC Handbook at pp. 214-15.

679. See text at note 433 supra.

690. NRC Handbook at p. 215; Philips Interview.

681. See, e.g., text at notes 501-04 supra (FTC).

682. See 5 U.S.C. § 555(e) (1982).

683. See text at notes 59-69 supra.

684. Philips Interview.

685. NRC Response. This statistic was calculated on the basis of processing time for petitions received since 1980 (41 in all).

686. *See* Commission Paper SECY-77-526 (Oct. 1977).

687. *Id.*

688. *Id.*

689. *See* 10 C.F.R. § 1.40(o).

690. Commission Paper SECY-77-526 (Oct. 1977).

691. *Id.*

692. *Id.*

693. *Id.*

694. *See* text following note 98 *supra.*

695. Philips Interview. Meeting the early deadlines relating to distribution and classification of documents is generally accomplished. *Id.*

696. Stello Memorandum, Philips Letter.

696a. Philips Letter.

696b. Stello Memorandum.

696c. *Id.* *See* text at notes 711-12 *infra*.

696d. Stello Memorandum.

697. On one occasion since 1980 a notice of receipt was not published and a petition denied summarily on the basis of lack of legal authority to grant the request. NRC Response. On another occasion, a petition was summarily denied because it raised an issue resolved by a recent rulemaking and presented no new information to justify reopening the matter. Philips Letter.

Recently the NRC has published a policy statement and staff implementation plan regarding the expeditious handling of petitions for rulemaking to exempt specific radioactive waste streams from disposal in a licensed low-level waste disposal facility. The agency describes the kind of information petitioners should file to allow timely review of the petition, the criteria for decision, and the procedures to be followed in considering the petition. The documents allegedly respond to the mandate of the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. § 2021b *et seq.* *See* 51 F.R. 30839-30847 (Aug. 29, 1986).

698. NRC Handbook at pp. 215-16.

699. See text at note 685 supra.

700. Id. at p. 216.

701. Philips Interview.

702. Id.

703. Handbook at p. 217.

704. Id.

705. NRC Response; Memorandum from William J. Dircks, Executive Director for Operations to Robert B. Minogue, Director, Office of Nuclear Regulatory Research et al. (April 5, 1985) (hereinafter "Dircks Memorandum").

706. Dircks Memorandum.

707. Dircks Memorandum.

708. Philips Interview.

709. Dircks Memorandum.

710. Philips Interview. See also 10 C.F.R. § 2.802(g).

711. See, e.g., NRC Regulatory Agenda, Quarterly Report, Oct.-Dec. 1985, NUREG-0936, Vol. 4, No. 4 (1986).

712. Philips Interview.

713. NCR Response.

714. Id.

715. Id.

716. Id.

717. Id.

718. Interview with Mark Greenwood, Assistant General Counsel, Solid Waste and Emergency Management Division, Environmental Protection Agency on July 10, 1986 (hereinafter "Greenwood Interview"); Interview with Susan Lepow, Acting Associate General Counsel for Water, and Lee Schroer and Margaret Silver, Attorneys, Water Division, Office of General Counsel, Environmental Protection Agency on July 10, 1986 (hereinafter "Lepow Interview").

720. Questionnaire Response under cover letter from Gerald Yamada, Deputy General Counsel, EPA to author (Aug. 29, 1986) (hereinafter "EPA Response").

721. Interview with Alan Carpien and Andrew Gordan, Staff Attorneys, Office of General Counsel, EPA on July 10, 1986 (hereinafter "Carpien Interview"); Lepow Interview.

722. *See* 7 U.S.C. § 136 *et seq.* (1982).

723. *Id.* § 136a(d)(3). *See also id.* § 136n(a).

724. *See* 21 U.S.C. §§ 346a(d), 348 (1982).

725. EPA Response.

726. *See* 21 U.S.C. § 346a(d) (1982). EPA has both regulations and internal staff directives relating to pesticide tolerances. *See* 40 C.F.R. §§ 180.7, 180.29, 180.32; Memorandum from Douglas D. Campt, Director, Registration Division, Regarding Standard Operating Procedure 3041.1; Procedure for Processing Tolerance Petitions (Jan. 4, 1985). To the extent the existence and elaborateness of these regulations is accompanied by a substantial number of petition filings, the conclusion following note 196 *supra* finds support in EPA practice.

727. *See* 7 U.S.C. § 136a(d)(3) (1982).

728. *See* 15 U.S.C. § 2601 *et seq.* (1982).

729. *See* Appendix A at notes 18-26 *infra*.

730. *See* 15 U.S.C. § 2620.

731. EPA Response.

732. Carpien Interview.

733. *See* 50 F.R. 46825-828 (Nov. 13, 1985).

734. *Id.* at 46825-826.

735. *Id.* at 46826-827.

736. *Id.*

737. *Id.* at 46826.

738. *See* 10 C.F.R. § 2.802(b).

739. 50 F.R. at 46827.

740. *Id.*

741. EPA Response.

742. 50 F.R. at 46826.

743. Carpien Interview.

744. Id.

745. Id.

746. Id.

747. Id.

748. See text at note 730 supra.

749. Carpien Interview; EPA Response.

750. EPA Response.

751. See 15 U.S.C. § 2620(b)(3) (1982).

752. See text at notes 59-69 supra.

753. 15 U.S.C. § 2620(b)(3) (1982).

754. 5 U.S.C. § 555(b). If the grant is considered the "conclusion" of the matter presented to the agency, the duty of the agency under § 555(b) to act promptly has arguably been discharged.

755. See text and accompanying note 590 supra.

756. Id. Under TSCA the denial occurs prior to commencement of the rulemaking. Arguably APA Section 555(e) is inapplicable to petitions governed by TSCA.

757. EPA Response.

758. 42 U.S.C. § 6921 et seq. (1982).

759. Id. § 6974(a).

760. See text at notes 59-69 supra.

761. See 40 C.F.R. Part 260.

762. Greenwood Interview.

763. See 40 C.F.R. §§ 260.21 (petitions for equivalent testing or analytical methods); 260.22 (excluding waste produced at a particular facility from lists of hazardous wastes).

764. EPA Response.

765. See 40 C.F.R. § 260.20.

766. Id. § 260.20(a).

767. Id. § 260.20(b).

768. Greenwood Interview; EPA Response.

769. 40 C.F.R. § 260.20(c).

770. Id.

771. Id. (d).

772. Id. (e).

773. Greenwood Interview.

774. EPA Response. But see 33 U.S.C. § 1251(e) (EPA to encourage and assist public participation in development and revision of rules and to publish regulations specifying minimum guidelines for public participation). The regulations implementing § 1251(e), see 40 C.F.R. Part 25, cover rulemaking activities without mention of the petition process. Id. § 25.10.

775. 42 U.S.C. § 7401 et seq. (1982).

776. 33 U.S.C. § 1251 et seq. (1982).

777. 42 U.S.C. §§ 300f et seq. (1982).

778. EPA Response; Lepow Interview.

779. EPA Response.

780. Lepow Interview.

781. EPA Response.

782. Id.

783. Id.

784. See, e.g., Luneburg, Federal-State Interaction Under the Clean Air Amendments of 1970, 14 B.C. Ind. & Com. L. Rev. 637, 640 (1973).

785. EPA Response.

786. Id.

787. Id.

788. Id.

789. Lepow Interview.

790. Id.

790a. Id.; EPA Response.

791. EPA Response.

792. Lepow Interview.

793. Carpien Interview.

794. See text at notes 733-40 supra.

795. But see 42 U.S.C. § 6974(b)(1) (mandate to the agency to encourage public participation).

796. Greenwood Interview.

797. 5 U.S.C. § 553(e).

798. See, e.g., 15 U.S.C. § 2620 (1982).

799. See, e.g., text at notes 225-26, 299-302, 454 infra.

800. Compare text with, e.g., Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976) (no standing).

801. See text at note 810 infra.

802. See, e.g., Natural Resources Defense Council, Inc. v. SEC, 606 F.2d 1031, 1042 (D.C. Cir. 1979); National Association of Concerned Veterans v. Secretary of Defense, 487 F. Supp. 192, 195-6 (D.C. 1979). It might be argued that while the APA does not mandate the granting of petitions, congressional creation of the right to petition implies congressional intent that persons only "abstractly interested" be permitted to obtain judicial review of the denial of their petitions. Cf. note 806 infra.

803. 15 U.S. § 2620(a) (1982).

804. Id. § b(4)(A).

805. In the case of a denial, the statute provides that "the petitioner may commence a civil action . . . ." Id.

806. See, e.g., Linda R. S. v. Richard D., 410 U.S. 614, 617 n.3 (1973).

807. See, e.g., 42 U.S.C. § 6976(a)(1982). See also Oljato Chapter of Navajo Tribe v. Train, 515 F.2d. 654, 664-5 (D.C. Cir. 1975).

808. See, e.g., 15 U.S.C. § 2620(b)(4)(A).

809. See, e.g., text following note 64 supra.

810. See ACUS, A GUIDE TO FEDERAL AGENCY RULEMAKING 239-40 (1983).

811. Telecommunications Research & Action Center v. FCC, 750 F.2d 70 (D.C. Cir. 1984).

812. Id. at 75-77.

813. The classic treatment is, of course, Abbott Laboratories v. Gardner, 387 U.S. 136 (1967). See also FTC v. Standard Oil Co. of Calif., 449 U.S. 232 (1980).

814. See, e.g., Public Citizen Health Research Group v. Commissioner, 740 F.2d 21, 30-34 (D.C. Cir. 1984) (applying the Abbott Laboratories test but noting that it does "not accommodate the interests of those whom regulations are meant to benefit or protect.").

815. See, e.g., id.; Wisconsin Electric Power Co. v. Costle, 715 F.2d 323 (7th Cir. 1983); Professional Drivers Council v. Bureau of Motor Carrier Safety, 706 F.2d 1216 (D.C. Cir. 1983); ITT World Communications, Inc. v. FCC, 699 F.2d 1219 (D.C. Cir. 1983); WWHT, Inc. v. FCC, 656 F.2d 807 (D.C. Cir. 1981); National Organization for the Reform of Marijuana Laws v. Ingersoll, 497 F.2d 654 (D.C. Cir. 1974); National Association of Concerned Veterans v. Secretary of Defense, 487 F. Supp. 192 (D.C. 1979).

816. 5 U.S.C. § 701(a)(2)(1982). See, e.g., WWHT, Inc. v. FCC, 656 F.2d 807, 814 (D.C. Cir. 1981). But see New York Racing Ass'n, Inc. v. NLRB, 708 F.2d 46 (2d Cir. 1983).

817. See, e.g., International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America v. Donovan, 590 F. Supp. 747 (D.C. 1984).

818. See, e.g., text at note 804 supra.

819. See also Abbott Laboratories v. Gardner, 387 U.S. 136, 144 (1967).

820. 105 S. Ct. 1649 (1985).

821. Id. 1656.

822. See, e.g., Sunstein, Reviewing Agency Inaction After Heckler v. Cheney, 52 U. Chi. L. Rev. 653, 680-81 (1985).

823. See text at notes 51-5 supra.

824. See, e.g., 42 U.S.C. § 6297(b)(1982).

825. See, e.g., 16 U.S.C. § 1533(a).

826. See Sunstein, supra note 822, at 681-82.

827. 105 S. Ct. at 1652 n. 2.

828. See, e.g., ITT World Communications, Inc. v. FCC, 699 F.2d 1219, 1245-6 (D.C. Cir. 1983).

829. See, e.g., id. See also, e.g., WWHT, Inc. v. FCC, 656 F.2d 807, 817; International Union v. Donovan, 590 F. Supp. 747, 750 (D.C. 1984).

830. See, e.g., 15 U.S.C. § 2620b(4)(B) (de novo review).

831. See, e.g., Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 542 (1978).

832. See, e.g., Public Citizen Health Research Group v. Commissioner, 740 F.2d 21 (D.C. Cir. 1984).

833. See, e.g., Telecommunications Research and Action Center v. FCC, 750 F.2d 70, 80 (D.C. Cir. 1984).

834. National Org. for Reform of Marijuana Laws v. Ingersoll, 497 F.2d 654, 659 (D.C. Cir. 1974) (citing Municipal Light Boards v. FPC, 450 F.2d 1341, 1345 (D.C. Cir. 1971)). See also text at notes 89-95 supra.

835. 435 U.S. 519 (1978).

836. Wisconsin Electric Power Co. v. Costle, 715 F.2d 323 (7th Cir. 1983). The court stated that "[t]he APA does not detail procedures for petitions made pursuant to § 553(e). Therefore the EPA does not violate the APA by not having detailed procedures governing petitions to begin rulemakings." Id. at 328. While technically the court may be correct, the legislative history of the APA demonstrates the assumption of the drafters that such procedures would be adopted. See text at notes 69-72 supra.

837. 715 F.2d at 328.

838. See ACUS, A GUIDE TO FEDERAL AGENCY RULEMAKING 202 (1983).

839. Id.

840. See, e.g., WWHT, Inc. v. FCC, 656 F.2d at 817.

841. See ITT World Communications, Inc. v. FCC; 699 F.2d at 1264 (compliance with "substantive norms" requires "exacting scrutiny"); Bargmann v. Helms, 715 F.2d 638, 640 (D.C. Cir. 1983); National Association for the Advancement of Colored People v. FPC, 520 F.2d 432 (D.C. Cir. 1975).

842. *Cf*. Natural Resources Defense Council, Inc. v. SEC, 606 F.2d at 1046-7.

843. SEC v. Chenery Corp., 332 U.S. 194, 202-3 (1947)(lack of experience with a problem, need for specialized treatment).

844. *See* Arkansas Power and Light Co. v. ICC, 725 F.2d 716, 723 (D.C. Cir. 1984).

845. 401 U.S. 402, 419-20 (1971).

846. *See*, *e.g.*, Florida Power & Light Co. v. Lorion, 105 S. Ct. 1598, 1607 (1985).

847. *See*, *e.g.*, United States v. Nova Scotia Food Products Corp., 568 F.2d 240, 249 (2d Cir. 1977).

848. *See* International Union v. Donovan, 590 F.Supp. 747, 752 (D.C. 1984). *See also* Oljato Chapter of Navajo Tribe v. Train, 515 F.2d 654, 666 (D.C. Cir. 1975).

849. International Union v. Donovan, 590 F.Supp. at 751 n.2.

850. *See* WWHT v. FCC, 656 F.2d at 817-18.

851. 5 U.S.C. § 552(b) (1982).

852. *See generally* 1 C.F.R. § 305.74-4 (ACUS Recommendation 74-4) (1983).

853. *See generally* ACUS, A GUIDE TO FEDERAL AGENCY RULEMAKING, 151-53 (1983).

854. *See* text at notes 198-214 *supra*. The observation in the text is obviously limited to the agencies and programs which were surveyed as part of this study.

855. *See* Merrill, *CPSC Regulation of Cancer Risks in Consumer Products, 1972-81*, 67 Vir. L. Rev. 1261 (1981); Swartz, *The Consumer Product Safety Commission: A Flawed Product of the Consumer Decade*, 51 George Wash. L. Rev. 32 (1982).

856. *See* text preceding note 99 *supra*.

857. 5 U.S.C. § 553(c). *But see id.* 553(b)(A), (B).

858. *See*, *e.g.*, 15 U.S.C. § 57a(b)(2)(A).

859. *See*, *e.g.*, 16 C.F.R. § 1.11 (initial notice of proposed rulemaking with regard to trade regulation rules).

860. *See* Appendix A at notes 2, 9, 29, 40 *infra*.

861. *Cf.* J. O'REILLY, ADMINISTRATIVE RULEMAKING at 332 (1983).

862. *See* text at notes 59-69 *supra*.

863. *See*, *e.g.*, text at note 569 *supra*.

864. *See*, *e.g.*, text at note 425 *supra*.

865. Notice to statutorily established advisory committees may be particularly appropriate. *See* Letter from David C. Vladeck, Staff Attorney, Public Citizen Litigation Group to author (Aug. 27, 1986). Mr. Vladeck also raised the idea of agencies' establishing "standing advisory committees to assist [them] in considering petitions." *Id.*

866. *See* text at notes 571-73 *supra*.

867. Reevaluation of the merits may be appropriate after a lapse of time.

868. *See* text at note 315 *supra*.

869. *See* Appendix A at notes 2, 8, 29, 40 *infra*.

870. The required publication of receipt of a petition functions in some instances as a notice of proposed rule-making. *See*, *e.g.*, Appendix A at notes 29 and 40 *supra*. This is not always the case. *See* Appendix A at note 8 *supra*.

871. *See* text at 337-44 *supra*.

872. *Cf.* *e.g.*, text at note 235 *supra*.

873. *See*, *e.g.*, text at notes 845-49 *supra*.

874. *See*, *e.g.*, text at notes 276-80 *supra*.

875. *See* Appendix C at notes 83-85 *infra*.

876. *See*, *e.g.*, text at note 710 *supra*.

877. *See*, *e.g.*, text at notes 323-32 *supra*.

878. *See* text at notes 147-50 *supra*.

879. *See*, *e.g.*, text at notes 733-36 *supra*.

880. *See* text following note 150 *supra*.

881. *See*, *e.g.*, text at note 780 *supra*.

882. *See* text at notes 69-72 *supra*.

883. *See* 1 C.F.R. § 305.71-3 (Recommendation No. 71-3, Articulation of Agency Policies). *See also* ACUS, A GUIDE TO FEDERAL AGENCY RULEMAKING 45 (1983).

884. See text following note 100 supra.

885. See text following note 393 supra.

886. See text at notes 75-80 supra.

887. 5 U.S.C. § 552(a)(1)(A), (B), (C) (1982).

888. See Appendix C at notes 13-16 infra.

889. See text at notes 628-29, 738-40 supra.

890. See, e.g., text at notes 349-51 supra.

891. Id.

892. See Appendix C at note 25 infra.

893. Compare, e.g., 21 C.F.R. § 10.30(b) (FDA) (explicit cross-reference) with 10 C.F.R. § 205.9 (DOE) (no explicit cross-reference). See also text at notes 395, 447-48 supra.

894. See text at notes 162-72 supra.

895. See, e.g., text at note 388 supra.

896. See text at notes 59-69 supra.

897. See text at note 684 supra.

898. See text following note 685 supra.

899. See Appendix C at notes 72-75 infra.

900. These difficulties perhaps did not occur to the Administrative Conference in its issuance of Recommendation 78-3, 1 C.F.R. § 305.78-3 (No. 5).

901. See note 590 supra.

902. See, e.g., text at notes 608-09 supra. But see text at note 749 supra.

903. See Tomlinson, Report on the Experience of Various Agencies with Statutory Time Limits Applicable to Licensing or Clearance Functions and to Rulemaking, reprinted in ACUS, 1978 RECOMMENDATIONS AND REPORTS 130.

904. See, e.g., id. at 122-23.

905. 5 U.S.C. §§ 555(b) (1982).

906. See, e.g., 15 U.S.C. § 2620 (1982).

907. *See*, *e.g.*, text at note 695 *supra*.

908. *See also* text at notes 688-94 *supra*.

909. *See* Appendix C at note 54 *infra*.

910. *See generally* Garner, *Management Control in Regulatory Agencies: A Modest Proposal for Reform*, 34 Ad. L. Rev. 465 (1982).

911. *See* Appendix C at notes 63-64 *infra*.

912. *See* text at notes 669-72 *supra*.

913. *See*, *e.g.*, Swartz, note 855 *supra*, at 52.

914. *See* Appendix C at notes 88-91 *infra*.

915. *See* Appendix A at notes 4, 22 *infra*.

916. One person who has had experience with the petition process of several agencies noted that an agency may make a mistake where it fails to clearly explain in a public fashion the denial of certain petitions:

> First, the agency passes up an opportunity to educate the public about what it is and is not doing--which can be valuable. Agency decisions not to act are as much a reflection of agency policy as affirmative decisions. Second, to the extent the agency wants to steer public participation in a particular direction, a denial statement that explains that the FTC, for instance, wants to de-emphasize deceptive price advertising cases to mount a campaign against health fraud would be particularly valuable to that segment of the public that was interested in assisting the FTC.

Letter from David C. Vladeck, Staff Attorney, Public Citizen Litigation Group, to author (July 27, 1986).

917. *See* 1 C.F.R. § 305.71-6 (ACUS Recommendation No. 71-6, Public Participation in Administrative Hearings, Recommd. E).

918. *See* Appendix C at note 76 *infra*.

919. *See*, *e.g.*, Appendix A at note 33 *infra*.

920. 5 U.S.C. § 555(e) (1982).

921. *See*, *e.g.*, text at notes 698-700 *supra*.

922. See, e.g., text at note 701 supra.

923. See Appendix C at notes 97-98 infra.

924. See text at notes 104-20 supra.

925. See text at notes 96-98 supra.

926. See 5 U.S.C. § 553(b)(A) (1982).

927. See 1 C.F.R. § 305.76-5 (ACUS Recommendation 76-5, Recommd. 2).

928. See, e.g., text at notes 899-907 supra.

929. See text following note 758 supra.

930. See text at note 730 supra.

931. See, e.g., Appendix A at notes 7-9 infra.

932. This study does not address the advisability of special provisions for judicial review of action on petitions such as found in 15 U.S.C. § 2620 (1982) (TSCA) nor should it be taken as suggesting that the substantive conditions found in statutes which relate to the grant or denial of petitions should be eliminated or modified.

933. See text at notes 899-907 supra.

934. The APA definition of "person" found in 5 U.S.C. § 551(2) (1982) might be amended to ensure that states can utilize Section 553(e) where, for example, statutes specifically giving such entities the right to petition are repealed. See, e.g., Appendix A at notes 1-6 supra.

Appendix A

Selected Special Statutory Petition Provisions
(arranged by agency)

1. Department of Energy

Any state and any person subject to particular state regulations may file a petition with the Secretary of Energy for a rule regarding the supersession of a state regulation which establishes an energy efficiency standard or other requirement respecting energy use or energy efficiency.[1] Notice of the filing of the petition must be given (how or to whom is not specified) and interested persons must be afforded a reasonable opportunity to make written comments (suggesting that the notice must be to the public generally). The Secretary must consider the petition, views of the affected state, and any comments.[2] Within six months of the filing, the Secretary must deny the petition or "prescribe" the requested rule, though that time period can be extended if notice and reasons for the delay are published in the Federal Register.[3] Where a petition is denied, notice of the denial with reasons must be published in the Register.[4] The statute lays down the substantive considerations to be taken into account in considering petitions.[5] If the Secretary prescribes the requested rule, he must publish his findings.[6]

2. Environmental Protection Agency

a. Noise Pollution. States may petition the Administrator to revise noise emission standards for products on the ground that more stringent standards are necessary to protect the public health and welfare.[7] Receipt of the petition must be published in the Federal Register.[8] Within ninety days of receipt, EPA must publish in the Register a proposed revised regulation or a decision not to propose revisions along with a "detailed" explanation for that decision.[9]

b. Hazardous Waste. Any person may petition the Administrator for the promulgation, amendment or repeal of any regulation under the Resource Conservation and Recovery Act of 1976.[10] Within a reasonable time following receipt of the petition, the Administrator must "take action with respect to such petition" (what type of action is not specified) and publish notice of such action in the Register along with the reasons.[11]

Public participation in the development and revision of regulations must be provided for, encouraged and assisted by the Administrator.[12] EPA is further required to develop and publish minimum guidelines for public participation.[13] (These mandates would seem to apply to the petition process itself.) Judicial review of denial of these petitions is expressly contemplated.[14]

c. Toxic Substances

1) Testing of Chemicals and Mixtures. Persons intending to manufacture or process certain chemical substances may petition the Administrator to prescribe standards for the development of test data.[15] Grant or denial must occur within 60 days of receipt of the petition and, if the petition is granted, the Administrator must "prescribe" such standards within 75 days of the date of the grant.[16] If the petition is denied, the reasons must be published in the Federal Register.[17]

2) Rules Relating to Testing, Regulation and Reporting Regarding Hazardous Chemical Substances and Mixtures. Any person may petition the Administrator "to initiate a proceeding for the issuance, amendment, or repeal" of various rules.[18] The petition must be filed in the "principal office of the Administrator" (wherever that is) and set forth facts supporting the request.[19] The Administrator may hold a public hearing or conduct such investigation or proceeding as he or she deems appropriate to determine whether or not to grant the petition.[20] Within 90 days of the filing of the petition, the Administrator must grant or deny it. If he grants it, he must "promptly commence an appropriate proceeding" in accordance with other provisions of the statute.[21] If he denies a petition, the Administrator must publish in the Register his reasons.[22] Denial or inaction with regard to a petition is subject to judicial review[23] in a de novo proceeding.[24] Where EPA is engaging in regulation of more significant chemical risks, the court may on the basis of the lack of agency resources refuse to order that the rulemaking be initiated immediately.[25] The court may award costs and fees for attorneys and expert witnesses.[26]

3. Food and Drug Administration

a. Food Additives. Any person may file a petition proposing the issuance of a regulation prescribing the conditions under which a food additive may be safely used.[27] The petition must contain certain designated information along with explanatory and supporting data.[28] Notice of the proposed regulation must be published "in general terms" within 30 days of its filing.[29] Within 90,[30] or in some cases up to 180, days[31] of the filing of the petition, the Secretary must issue a regulation (whether or not identical to that requested) or deny the petition.[32] In either case he must notify the petitioner of his action and the reasons for it.[33] Orders establishing regulations or denying petitions must be published.[34]

Within 30 days of the publication of an order, any person adversely affected may file objections and request a hearing,[35] after which hearing the Secretary must act on the objections. Substantive criteria for the Secretary's action on petitions is set forth.[36] Judicial review of orders entered after hearing is expressly authorized.[37]

b. Certification of Certain Drugs. Any interested person may file a petition proposing the issuance, amendment or repeal of certain regulations applicable to antibiotic drugs.[38] The petition must set forth the proposal in general terms along with the grounds for the request.[39] The Secretary must give public notice of the proposal and opportunity for all interested persons to comment.[40] As soon as practicable thereafter he must "make public his action" on the proposal. Within thirty days of that, any interested person may file objections and request a hearing.[41] The Secretary must, after due notice, hold a public hearing and, as soon as practicable after the completion of the hearing, he or she must by order make public his or her action on the objections.[42] Judicial review of orders after hearing is expressly provided for.[43]

4. Department of the Interior.

a. Endangered Species. To the extent practicable, within 90 days of receipt of a Section 553(e) petition to add a species to or remove it from the endangered or threatened species lists,[44] the Secretary must make a finding "whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted"[45] and promptly publish that finding in the Federal Register.[46] If the petition does make that showing, the Secretary must "promptly commence a review of the status of the species."[47] Within twelve months of receiving a petition presenting the requisite information, the Secretary must find (1) that the petitioned action is not warranted and promptly publish that finding in the Register;[48] (2) that the petitioned action is warranted in which case he or she must promptly publish in the Federal Register a notice and text of a proposed regulation;[49] or (3) that the petitioned action is warranted but certain conditions obtain in which case he or she must promptly publish such finding in the Register along with a description and evaluation of the reasons and data underlying that finding.[50] Judicial review of various findings is expressly provided for.[51]

The Secretary is directed to establish and publish in the Register agency guidelines "to insure that the purposes of this section are achieved efficiently and effectively"[52] including "procedures for recording the receipt and the disposition of petitions"[53] and "criteria for making the findings required . . . with respect to petitions."[54] The Secretary must provide public notice of and opportunity to comment on proposed guidelines of this nature.[55]

b. Surface Coal Mining and Reclamation. Any person may petition the Director of the Office of Surface Mining Reclamation and Enforcement "to initiate a proceeding for the issuance, amendment, or repeal" of rules relating to surface mining and reclamation.[56] A petition must be filed "in the principal office of the Director" and set forth the facts which serve as its basis.[57] The Director may hold a public hearing or conduct such investigation or proceeding as he deems appropriate in determining whether to grant the petition.[58] Within 90 days of the filing of the petition, the Director must grant or deny it. If granted the agency must "promptly commence an appropriate proceeding in accordance with the provisions" of the statute.[59] If the petition is denied, the petitioner must be notified in writing of the reasons for the denial.[60]

5. Interstate Commerce Commission

When an APA Section 553 petition is filed for a rulemaking related to rail carrier transportation, the Commission must grant or deny the petition within 120 days of its receipt.[61] If the petition is granted, the Commission must "begin an appropriate proceeding as soon as practicable."[62] If the petition is denied, the reasons must be published in the Register.[63]

Judicial view of denials and inaction is provided for.[64] The reviewing court is directed to order the agency to begin the action requested if it finds that action is "necessary and failure to take [it] will result in the continuation of practices that are not consistent with the public interest or are not in accordance" with applicable statutes.[65] The judicial proceeding is de novo to an extent.[66] Relief is limited to an order directing the Commission to begin a rulemaking proceeding.[67]

6. National Highway Traffic Safety Administration

Any interested person may file with the Secretary of Transportation a petition "requesting him . . . to commence a proceeding respecting the issuance of an order" establishing federal motor vehicle safety standards.[68] Such a petition must set forth facts supporting the action requested and a brief description of the substance of the standard requested.[69] The Secretary may hold a public hearing or conduct such investigation or proceeding he deems appropriate in order to determine whether or not such petition should be granted.[70] Within 120 days of the filing of the petition, the Secretary must grant or deny it.[71] If he or she grants it, she must "promptly commence the proceeding requested in the petition."[72] If the Secretary denies the petition, he or she must publish reasons in the Federal Register.[73]

Appendix A Footnotes

1. 42 U.S.C. § 6297(b)(1), (b)(2), (b)(3) (1982).

2. Id.

3. Id. (b)(4).

4. Id. (b)(4).

5. Id. (b)(1)(A), (B); b(2); b(3)(A), (B).

6. Id. (b)(1), (b)(3).

7. Id. § 4905(f) (1982).

8. Id.

9. Id.

10. Id. § 6974(a) (1982).

11. Id.

12. Id. (b).

13. Id.

14. Id. § 6976 (1982).

15. 15 U.S.C. § 2603(g) (1982).

16. Id.

17. Id.

18. Id. 2620(a) (1982).

19. Id. (b)(1).

20. Id. § 2620(b)(2).

21. Id. § 2620(b)(3).

22. Id.

23. Id. § 2620(b)(4)(A).

24. Id. (b)(4)(B).

25. Id.

26. Id. (b)(4)(C).

27. 21 U.S.C. § 348(b)(1) (1982).

28. Id. (b)(2).

29. Id. (b)(5).

30. Id. (c)(2).

31. Id.

32. Id. (c)(1).

33. Id. (c)(1)(A), (B).

34. Id. (e).

35. Id. (f).

36. Id. (c)(3), (5).

37. Id. (g).

38. Id. § 357(f) (1982).

39. Id.

40. Id.

41. Id.

42. Id.

43. Id. See also 21 U.S.C. § 371(e) (petitions relating to other types of FDA rulemaking subject to procedures similar to those found in §§ 348 and 357).

44. 16 U.S.C. § 1533(c) (1982).

45. Id. § 1533(b)(3)(A).

46. Id.

47. Id.

48. Id. § 1533(b)(3)(B)(i).

49. Id. (B)(ii).

50. Id. (B)(iii). Somewhat similar procedures apply to petitions applicable to "critical habitats." See id. (D)(i), (ii).

51. Id. (C)(ii).

52. Id. § 1533(g).

53. *Id.* (g)(1).

54. *Id.* (g)(2).

55. *Id.* (g).

56. 30 U.S.C. § 1211(g)(1) (1982).

57. *Id.* (g)(2).

58. *Id.* (g)(3).

59. *Id.* (g)(4).

60. *Id.* *See also* 30 U.S.C. § 1272(c) (1982) (petition to have area designated as unsuitable for surface coal mining).

61. 49 U.S.C. § 10326(a) (1982).

62. *Id.*

63. *Id.*

64. *Id.* (b)(1).

65. *Id.* (b)(2).

66. *Id.*

67. *Id.*

68. 15 U.S.C. § 1410a(a) (1982).

69. *Id.* (b).

70. *Id.* (c).

71. *Id.* (d).

72. *Id.*

73. *Id.*

Appendix B

Regulatory Flexibility/Impact Analysis and the Regulatory Planning Process

With respect to the RFA, the regulatory agendas published in October and April each year[1] have to list some agency actions to be taken in response to petitions. Each agenda must contain, among other things,[2] "a brief description of the subject matter area of any rule which the agency expects to propose or promulgate which is likely to have a significant economic impact on a substantial number of small entities."[3] Notices of proposed rule-making and final rules to be issued in response to petitions must, therefore, be included in the agendas while denials of petitions, as such, do not.[4] Similarly whether a grant of a petition is deemed to occur when a notice of proposed rule-making is issued or when a final rule is adopted,[5] regulatory flexibility analyses must be prepared at those stages,[6] though they need not be for a denial as such[7] or if a "grant" suggests merely that the agency thinks the idea is a good one but the agency does not issue a notice of proposed rule-making in response to the petition.

To the extent that denial of petitions for rule-making, particularly petitions to amend or revise existing rules, are not covered by the RFA, the purposes of that statute in focusing agency concern on the burdens of regulation imposed on small business entities[8] may not be fully achieved in some instances. Certainly there are cases where a petition from a small business may suggest alternative types of regulation (or deregulation) which may reduce the aggregate cost of the regulatory program for the public and the government. An agency might reasonably be required to undertake an analysis similar to that mandated prior to its proposing to regulate in the first place.

The requirements of Executive Order 12,291 for the preparation of preliminary and final regulatory impact analyses, transmittal to and review of rules by OMB, and consultation with the OMB Director apply by their terms only at the notice of proposed rule-making and final rule stages.[9] The requirements do not vary depending on whether the notice of proposed rulemaking or final rule have their origins in the petitions process. At the same time these requirements do not appear to apply if a petition "grant" connotes no more than "thank you for your good idea, we will consider it" unless the agency intends also to issue a notice of proposed rule-making. Denials of petitions for rule-making are not, as such, expressly subject to the requirements of this Executive Order though a notice of proposed rule-making or final rule may in fact constitute a denial of a petition to the extent they differ from the petitioner's request.[10] As in the case of the RFA, the underlying purposes and approach of this Executive Order[11] suggest that the failure to include all denials should be remedied. Finally, the regulatory agendas called for by the Order include regulations the agency "expects to issue"[12] and thus encompasses rules whose initial impetus was a petition.

When it comes to Executive Order 12,498 and its establishment of a "regulatory planning process," the scope of coverage of the petition-process is far more encompassing than that of the RFA and Executive Order 12,291. The head of each agency must annually submit to the OMB Director "such information concerning all significant regulatory actions of the agency, planned or underway, including actions taken to consider whether to initiate rule-making; requests for public comment; and the development of documents that may influence, anticipate, or could lead to the commencement of rulemaking proceedings at a later date, as the Director deems necessary . . . ."[13] Therefore, it would seem that the publication of a petition for comments is an action concerning which OMB could require information if the subject matter of the petition were deemed "significant." Even the mere filing of such a petition, to the extent it inevitably triggers some intra-agency consideration of the merits, seems to be within the Order's purview.

The obligation to advise OMB and submit an action to its review is not, however, limited to the time when an agency's yearly regulatory plan is prepared.[14] It continues following submission of that plan where the agency head proposes to take regulatory action not previously submitted for review or one "that is materially different from the action described in the agency's Final Regulatory Program."[15] In that instance, unless, for example, a statute imposes a deadline for action, the agency must refrain from taking the action until OMB review is completed.[16] The head of each executive agency is, furthermore, directed to ensure that all regulatory actions are consistent with both the goals of the agency and of the Administration.[17]

OMB Bulletin 85-9[18] elaborates on this Executive Order. It defines a "prerulemaking action" in part as "any important action taken to consider whether to initiate, or in contemplation of, rulemaking; publication of advance notices of proposed rulemaking and all similar notices, publications, and requests for public comment . . . ,"[19] a definition obviously broad enough to encompass much of the petition process. A prerulemaking action is considered a "significant regulatory action" if it would be a step toward adoption of a rule that is or would be, inter alia, a "major rule" as defined by Executive Order No. 12,291, a priority of the agency head, subject to a statutory deadline, of unusual public interest, or likely to establish an important new policy.[20] Each agency must submit to OMB a draft and final annual regulatory program, including specified information for each "significant regulatory action [which includes pre-rulemaking actions] that the agency proposes to pursue" during the year.[21] These requirements attempt both to involve agency heads earlier in the regulatory management process when policy options are broadest[22] and to insure that "agency resources will not be expended on regulatory actions that are not consistent with the regulatory goals of the agency head and of the President."[23] Once the Administration's Regulatory Program is in place, agency heads must submit to OMB for review proposed significant regulatory actions (including pre-rulemaking activity) not previously submitted or materially different from those described in the agency's final regulatory program.[24] Except in the case where a statutory deadline prevents it, an agency must refrain from taking the proposed action pending OMB review.[25] OMB may return such actions to the agency for "reconsideration."[26]

In sum agency investigation of the merits of certain petitions along with issuance of notices soliciting comments are within the purview of this "regulatory planning process," though OMB has the authority to provide for exemptions from coverage.[27] OMB comments may be influential (or crucial) in the decision to grant a petition and in the determination whether or not to take a particular step in consideration of a petition. Regardless of its effect on the disposition of the merits of a petition, its review can introduce delay into the proceeding.

Appendix B Footnotes

1. *See* 5 U.S.C. § 602(a) (1982).

2. *Id.* § 602(a)(1)-(3).

3. *Id.* (a)(1).

4. To the extent the proposed or final rule mirrors an APA Section 553(e) petition in some particulars but departs from it in others, there is a denial which OMB is at least de facto informed of.

5. *See* main text at notes 59-66 *supra*.

6. 5 U.S.C. § 603, 604 (1982).

7. *But see* note 4 *supra*.

8. *See* Pub. L. No. 96-354, 94 Stat. 1164, § 2 (Sept. 19, 1980).

9. Exec. Order No. 12,291, § 3, 3 C.F.R. 127 (1981), *reprinted in* 5 U.S.C. app. § 601, at 136 (Supp. V 1981).

10. *See* note 4 *supra*.

11. Exec. Order No. 12,291 § 2.

12. *Id.* § 5(a).

13. Exec. Order No. 12,498, § 2(a), 3 C.F.R. 323 (1986), *reprinted in* 21 *Weekly Comp. Pres. Doc.* 11 (Jan. 7, 1985).

14. *Id.* § 3.

15. *Id.* § 3(c).

16. *Id.*

17. *Id.* § 1(b).

18. OMB Bulletin No. 85-9, The Administration's Regulatory Program--1985 (Jan. 10, 1985), *reprinted in* ACUS, FEDERAL ADMINISTRATIVE SOURCE BOOK 31, 43 (1985).

19. *Id.* § 5(a).

20. *Id.* § 5(c).

21. *Id.* § 6(b), 9(d).

22. *Id.* § 7.

23. *Id.*

24. Id. § 10(a).

25. Exec. Order No. 12,498, § 3(c); OMB Bulletin No. 85-9, § 10(b).

26. Exec. Order No. 12,498, § 3(d); OMB Bulletin No. 85-9, § 10(e).

27. Exec. Order. No. 12,498, § 1(a), 2(c); OMB Bulletin No. 85-9, § 11.

Appendix C

A Narrative Overview of Rulemaking Petition Regulations

The petition process can be divided into four main phases: filing, agency consideration of the petition, final action to deny or take other action with regard to the request, and reconsideration of decisions with regard to petitions.

1. Filing of the Petition

Some of the most common aspects of petition regulations include identification of the address where petitions must be filed[1] along with the name of the addressee[2] and provision for opening of a public[3] file in a docket room.[4] That file generally includes a copy of the petition[5] and associated documents[6] and may be assigned a docket or other control number.[7]

As to form of submission, in some cases the document must be designated expressly as a petition[8] and conform to various requirements such as number of copies,[9] paper size,[10] signature,[11] and verification.[12] Invariably a written[13] document is expected. It generally must state, at a minimum, the nature of the petitioner's interest in the subject matter of the requested action,[14] the terms or substance[15] of the regulatory change sought, and supporting arguments and/or information.[16] Several agencies, in addition, require the submission of information relating to the prospective economic impact of the regulation sought and/or information necessary to assist the agency in carrying out its obligations under the National Environmental Policy Act.[17] Where the agency must make specific findings before promulgating a rule, the procedural regulations may be particularly specific in terms of the type of data required or suggested to be furnished.[18] Some agencies mandate that the petitioner keep information provided up to date[19] and even supply information undercutting its position.[20] Special provisions may set out the way in which the petitioner or others may claim confidential treatment for part of their submissions.[21]

In a few cases, a written acknowledgment of receipt or filing of the petition is given by the agency to the petitioner.[22] Where the agency prescribes in some detail the contents of a petition, agency review to determine whether the requirements are met may be provided for,[23] along with a self-imposed time limit for making this determination[24] and notification to the petitioner of any procedural rejection and the reasons.[25] Some regulations make provision for the withdrawal of or amendment to petitions.[26]

2. Consideration of Petitions

Some agencies have expressly delegated the responsibility to act on certain petitions to designated agency officials.[27] In at least one case this is coupled with authority to screen out petitions which are either meritless or, for one reason or another, do not warrant further agency consideration.[28]

In some instances, statutory requirements mandate Federal Register[29] or other public notice[30] of the receipt of petitions and the regulations mirror this,[31] though even in the absence of statutory command some agencies on their own may provide for public notice via the Register[32] or otherwise[33] of the receipt of petitions. Such notice serves as a mechanism primarily for soliciting comments from interested persons regarding what action the agency should take with regard to the petition.[34] Where statutes do not mandate notice, the regulations usually retain agency discretion to issue it,[35] but not always.[36] The content of the notice may be described[37] and time limits for its publication and/or submittal of comments may be established.[38] Where the petition seeks the amendment or repeal of a rule, regulated entities may have to be specifically served with a copy of the petition.[39] In some cases submissions in support of or in opposition to a petition will be accepted even though publication notice of the filing is not issued.[40]

If the agency uses a comment process for involving outsiders in the decisionmaking, there may be requirements that comments be served on the petitioner[41] and filed within a specific period of time[42] as well as provision of a separate time period for filing comments in reply to comments.[43]

Some agencies provide for meetings,[44] conferences,[45] or hearings,[46] the conduct of which proceedings is most likely to be relatively informal.[47] Generally utilization of these methods of more intensive solicitation of the views of outsiders are discretionary with the agency.[48] Transcripts of these may be provided for[49] and at times expressly made part of the record of the proceedings.[50] In making decisions on petitions, ex parte communication restrictions usually do not apply.[51]

In most instances the regulations do not expressly limit the agency with regard to where it may look for data and arguments for its decision on the petition,[52] though the regulations may purport to specify the content of the record for decision.[53] In a few cases an agency may specify the criteria for granting petitions, generally stated in broad terms which boil down to the need for the regulation and the availability of agency time and resources to embark on rulemaking.[54] In one case, the standard for granting a petition is expressly phrased in terms of the likelihood of ultimately adopting the proposal.[55] In another instance, the briefing package provided by staff to the agency decisionmaker is made available to the petitioner so that the petitioner may comment on it[56] in advance of the decision.

There may be relatively strict,[57] or more vaguous,[58] timeframes for action on petitions, with[59] or without[60] a statutory mandate to that effect. There may be a provision for extension,[61] perhaps noticed in the Federal Register.[62] To keep the petitioner advised, status reports on the agency's progress with regard to the disposition of the petition may be required[63] and these may be tied to strict timetables.[64]

3. Decision on the Petition

Many regulations talk of both denials[65] and grants[66] of petitions. Others avoid using these terms.[67] Where the APA is the only applicable petition statute, some agencies consider the grant of a petition to connote the issuance of a final rule;[68] others view it as signifying no more than the obligation to issue a notice of proposed rule-making.[69] Another type of disposition which is considered by some agencies as a "grant" is issuance of an advance notice of proposed rule-making,[70] whose purpose may be largely the same as that achieved by the publication of notice of receipt of a petition, that is, solicitation of outside comments with regard to what further action the agency should take.[71] In this instance, a "grant" appears to be little more than agency acknowledgment that the idea is a good one and worth further study.

Of course, short of promulgation of a rule in "final" form, any formal agency action on a petition, other than a denial, signifies merely continuing agency consideration of the subject matter accompanied usually, though not always, by some degree of favorable agency disposition toward the merits. As indicated previously,[72] considering a grant of an APA petition to occur only with issuance of a final rule makes some sense because it requires the agency to complete its entire consideration of the merits of a proposal within a "reasonable time,"[73] a time standard that imposes some pressure on the agency but generally not so much as to terribly distort the agency's statutory or self-initiated regulatory agenda. In this connection it is important to note that in many instances[74] where Congress has imposed strict time limits on agency action on petitions, the grant is deemed to occur *prior to formal commencement of rulemaking*,[75] thus obviating the problems that would be created for an agency if it had to complete the rulemaking within the specified time frame.

The regulations may require the agency to personally inform the petitioner of a favorable decision on the petition.[76] This may be accompanied by a variety of actions including public notice of this finding,[77] issuance of an advance notice of proposed rule-making,[78] a notice of proposed rule-making[79] or, in some cases, promulgation of the final rule without solicitation of comment.[80] The regulations may in fact detail the types of actions the agency may take on disposition of a petition.[81] In some cases the petitioner may be personally served with a copy of any notice of proposed rule-making issued.[82]

Where a notice of proposed rule-making is issued in response to a petition, some rules fold the petition file into the rule-making record.[83] Given judicial interpretation of agency responsibilities at this stage of rule-making,[84] the public must be informed of at least the factual materials in the petition file that formed the basis for the proposal.[85] This record incorporation, therefore, makes good sense. The agency can in the Federal Register notice of proposed rule-making made reference to the existence and location of the supporting documents in the file. Submissions with regard to the petition which argued against its grant will inevitably in many instances be resubmitted during the rule-making so incorporation saves this expense. Of course the agency may wish to reorganize the documents in the petition file to isolate those most directly relevant to the issues presented in the rule-making. Finally where grant of a petition is not considered to occur prior to rule adoption, the petition file would have to be considered part and parcel of the rulemaking record anyway.

Denial, in whole or part, of a petition signifies that the agency does not wish to pursue consideration of the matter proposed. While notice of denial may be published in the Register[86] and the regulations may set forth the general contents of that,[87] the petitioner is assured personal notification of the denial along with a written statement of reasons.[88] The APA and some other petitions statutes require this.[89] There are some instances, however, where "public" notice of denial, along with the reasons, published in the Register, appears to be all the petitioner is by statute entitled to,[90] though even here the regulations may provide for personal notice to the petitioner.[91] Regulations, in accordance with the APA may provide that notice of denial be "promptly" given."[92] In some instances there is a more specific time frame laid down for notification of a decision.[93] Finally, some agencies maintain public lists of petitions filed or pending[94] and their status[95] or disposition.[96]

4. Reconsideration

At times petitions for reconsideration of a decision on a rulemaking petition[97] (or even the decision adopting a final rule)[98] are treated as petitions for rulemaking and the procedures applicable to those apply. In other instances petitions for reconsideration of decisions on petitions,[99] as well as of adoption of final rules,[100] are governed by procedures distinct from those applicable to the initial filing of a petition for rulemaking, procedures which mandate, inter alia, form of petition,[101] manner of soliciting comments from outside the agency,[102] and time limits for agency action.[103] A petition for reconsideration may be available in instances where new information is discovered[104] or where the agency allegedly incorrectly evaluated the original materials for decision.[105] While in some instances these reconsideration procedures largely mirror the petition procedures,[106] special procedures for petitions for reconsideration of decisions on petitions as well as petitions for reconsideration of rules finally adopted do exist[107] and are presumably justified in many instances by, for example, the need to quickly dispose of these, the existence of an already compiled, though perhaps incomplete, record for decision and the need to explore only certain limited issues.

Appendix C Footnotes

1. See, e.g., 15 C.F.R. § 303.13(b) (International Trade Administration); 16 C.F.R. § 1051.3 (Consumer Product Safety Commission); 17 C.F.R. § 13.2 (Commodity Futures Trading Commission); 21 C.F.R. § 10.20(f) (Food and Drug Administration); 26 C.F.R. § 601.601(c) (Internal Revenue Service); 24 C.F.R. § 10.20(a)(1) (Housing and Urban Development); 49 C.F.R. § 552.4 (National Highway Traffic Safety Administration); 12 C.F.R. § 790.10(b) (National Credit Union Administration); 14 C.F.R. § 11.25(b) (Federal Aviation Administration); 10 C.F.R. § 2.802(a) (Nuclear Regulatory Commission); id. § 205.12(a)(10) (Department of Energy); 12 C.F.R. § 508.13 (Federal Home Loan Bank Board); 49 C.F.R. § 5.11(b)(1) (Department of Transportation); 10 C.F.R. 430.42(a) (Department of Energy).

2. See, e.g., 10 C.F.R. § 2.802(a) (NRC); id. § 205.12(a)(10) (DOE); 10 C.F.R. § 430.42(a) (DOE); 15 C.F.R. § 303.13(b) (ITA); 49 C.F.R. § 1110.2(c)(1) (Interstate Commerce Commission); 21 C.F.R. § 10.30(b) (FDA).

3. See, e.g., 10 C.F.R. § 2.802(e) (NRC); 10 C.F.R. § 430.44(d) (DOE); 21 C.F.R. § 10.20(j) (FDA); 24 C.F.R. § 10.4(b) (HUD).

4. See, e.g., 10 C.F.R. § 2.802(e) (NRC); 10 C.F.R. § 205.15 (DOE); 14 C.F.R. § 11.11 (FAA).

5. See, e.g., 10 C.F.R. § 2.802(e) (NRC); 24 C.F.R. § 10.4(a) (HUD).

6. See, e.g., 21 C.F.R. § 10.30(d) (FDA).

7. See, e.g., 10 C.F.R. §§ 2.802(e), 110.131(d) (NRC); 14 C.F.R. § 11.27(b)(1) (FAA); 21 C.F.R. § 10.30(c) (FDA).

8. See, e.g., 10 C.F.R. 205.12(a)(10) (DOE); 24 C.F.R. § 1720.5(b)(1) (HUD); 49 C.F.R § 552.4(b) (NHTSA). Cf. 16 C.F.R. § 1051.5(c)(2) (CPSC) (recommendation, not requirement).

9. 5 C.F.R. §§ 2429.24, .25 (Federal Labor Relations Authority); 10 C.F.R. § 430.42(a) (DOE); 14 C.F.R. § 11.25(b)(2) (FAA); 15 C.F.R. § 303.13(b) (ITA); 21 C.F.R. § 10.20(a) (FDA).

10. See, e.g., 5 C.F.R. §§ 2429.24, .25 (FLRA).

11. See, e.g., 21 C.F.R. § 1308.44(b) (Drug Enforcement Administration).

12. See, e.g., 46 C.F.R. § 502.51 (Federal Maritime Commission).

13. See, e.g., 5 C.F.R. § 2429.28 (FLRA); 7 C.F.R. § 2901.5 (Department of Agriculture, Office of Energy); 12 C.F.R.

§ 790.10(b) (NCUA); 16 C.F.R. § 1.9 (Federal Trade Commission); 16 C.F.R. § 1000.5 (CPSC); 29 C.F.R. § 516.10(a) (Wage & Hour Division, Labor Department); 29 C.F.R. § 102.124 (NLRB).

14. *See*, *e.g.*, 10 C.F.R. § 2.802(c)(2) (NRC); 12 C.F.R. § 790.10(b) (NCUA); 49 C.F.R. § 5.11(b)(3) (DOT); 14 C.F.R. § 11.25(b)(4) (FAA); 15 C.F.R. § 303.13(b)(2) (ITA); 17 C.F.R. § 13.2 (CFTC); 17 C.F.R. § 201.4(a) (Securities Exchange Commission); 24 C.F.R. 10.20(a)(3) (HUD). *See also* 21 C.F.R. § 10.3(a) (FDA) ("interested person" defined as "a person who submits a petition").

15. *See*, *e.g.*, 5 C.F.R. § 2429.28 (FLRA); 10 C.F.R. § 2.802(c)(1) (NRC); 49 C.F.R. § 5.11(b)(2) (DOT); 14 C.F.R. § 11.25(b)(3) (FAA); 15 C.F.R. § 303.13(b)(5) (ITA); 16 C.F.R. § 1051.5(a)(5) (CPSC); 17 C.F.R. § 13.2 (CFTC); 17 C.F.R. § 201.4 (SEC); 21 C.F.R. § 10.30(b) (FDA); 21 C.F.R. § 1308.44(b) (DEA); 22 C.F.R. § 1429.28 (FSLRB); 24 C.F.R. § 10.20(a)(2) (HUD); 29 C.F.R. § 516.10(a) (W&H Div.); 49 C.F.R. § 1110.2(c)(2) (ICC).

16. *See*, *e.g.*, 5 C.F.R. § 2429.28 (FLRA); 7 C.F.R. § 2901.5(a) (DOA, Energy); 10 C.F.R. §§ 2.802(c), (1), (2), 110.131(b) (NRC); 12 C.F.R. § 790.10(b) (NCUA); 49 C.F.R. § 5.11(b)(4) (DOT); 14 C.F.R. § 11.25(b)(5) (FAA); 15 C.F.R. §§ 303.13(b)(3), (4) (ITA); 16 C.F.R. § 1.9 (FTC); 16 C.F.R. § 1051.5(a)(4) (CPSC); 17 C.F.R. § 13.2 (CFTC) (optional); 17 C.F.R. § 201.4(a) (SEC); 21 C.F.R. § 10.30(b) (FDA); 21 C.F.R. § 1308.44(b) (DEA); 26 C.F.R. § 601.601(c) (IRS); 49 C.F.R. § 1110.2(c)(4) (ICC); 22 C.F.R. § 1429.28 (FSLRB); 24 C.F.R. § 10.20(a)(4) (HUD); 29 C.F.R. § 516.10(a) (W&H Div.); 29 C.F.R. § 102.124 (National Labor Relations Board).

17. *See*, *e.g.*, 10 C.F.R. §§ 51.22, .40, .41, .45, .68, .74, .93. .94, .102 (NRC); 21 C.F.R. § 10.30(b) (FDA).

18. *See*, *e.g*, 10 C.F.R. § 430.44 (DOE); 16 C.F.R. § 1051.5(b) (CPSC) (recommendation).

19. *See*, *e.g.*, 10 C.F.R. § 205.9(d) (DOE).

20. *See* 21 C.F.R. § 10.30(b) (FDA).

21. *See*, *e.g*, 7 C.F.R. 2901.5(2) (DOA, Energy); 10 C.F.R. §§ 205.9(f), 430.42(d) (DOE); 21 C.F.R. §§ 10.20(c)(6), 20.44 (FDA).

22. *See*, *e.g.*, 17 C.F.R. § 13.2 (CFTC); 17 C.F.R. § 201.4 (SEC); 21 C.F.R. §§ 10.20(g)(2), 10.30(c) (FDA).

23. *See*, *e.g.*, 10 C.F.R. §§ 2.802(e), (f) (NRC); 21 C.F.R. § 10.20(d) (FDA); 21 C.F.R. § 1308.44(c) (DEA).

24. See, e.g., 21 C.F.R. § 1308.44(c) (DEA, "reasonable time"); 49 C.F.R. § 211.7(b) (Federal Railroad Administration).

25. See, e.g., 10 C.F.R. § 2.802(f) (NRC); 16 C.F.R. § 1051.6(b) (CPSC); 21 C.F.R. § 10.20(c)(6) (FDA); 21 C.F.R. § 1308.44(c) (DEA); 29 C.F.R. §§ 1905.14(2), (3) (Occupational Safety and Health Administration).

26. See, e.g., 21 C.F.R. § 10.30(g) (FDA).

27. See, e.g., 10 C.F.R. §§ 1.40(o), (p) (NRC).

28. See 47 C.F.R. §§ 0.251(c), 1.401(e) (FCC).

29. See, e.g., 42 U.S.C. § 4905(f) (1982).

30. See, e.g., 42 U.S.C. § 6297(b) (1982).

31. See, e.g., 10 C.F.R. § 430.43 (DOE).

32. See, e.g., 10 C.F.R. §§ 2.802(e), 110.131(d) (NRC); 14 C.F.R. § 11.27(b) (FAA) (summary).

33. See, e.g., 47 C.F.R. § 1.403 (FCC). See main text at notes 333-336 supra.

34. See, e.g., 29 C.F.R. § 1905.14(b)(2) (OSHA).

35. See, e.g., 21 C.F.R. § 10.30(h)(3) (FDA); 43 C.F.R. § 14.4 (Interior); 49 C.F.R. § 211.11(a) (FRA).

36. See, e.g., 14 C.F.R. § 11.27(b) (FAA).

37. See, e.g., 10 C.F.R. § 430.43 (DOE); 14 C.F.R. § 11.27(b) (FAA); 29 C.F.R. § 1905.14(b)(2) (OSHA); 47 C.F.R. § 1.403 (FCC).

38. See, e.g., 14 C.F.R. § 11.27(b) (FAA) (extensions permitted).

39. See, e.g., 46 C.F.R. § 201.61 (Maritime Administration).

40. See, e.g., 16 C.F.R. § 1051.7(a) (CPSC); 21 C.F.R. § 10.30(d) (FDA).

41. See, e.g., 47 C.F.R. § 1.405(a) (FCC).

42. Id. (30 days after notice issued).

43. Id. (b). See also 16 C.F.R. § 1051.7(a) (CPSC) (service of comments on petitioner encouraged).

44. See, e.g., 16 C.F.R. 1051.8 (CPSC); 21 C.F.R. § 10.30(h)(1) (FDA); 49 C.F.R. § 552.7 (NHTSA).

45. See, e.g., 21 C.F.R. § 10.30(h)(1) (FDA).

46. See, e.g., 10 C.F.R. § 2.803 (NRC); 10 C.F.R. §§ 205.170, .172, 430.46 (DOE); 15 C.F.R. § 303.13(c) (ITA); 16 C.F.R. § 1051.8(a) (CPSC); 21 C.F.R. § 10.30(h)(2) (FDA); 24 C.F.R. § 1720.5(c) (HUD). But see 49 C.F.R. § 5.13 (DOT) (no public hearing prior to disposition).

47. See, e.g., 10 C.F.R. § 430.46 (DOE); 16 C.F.R. § 1051.8(b) (CPSC); 49 C.F.R. § 552.7 (NHTSA).

48. See, e.g., 10 C.F.R. § 2.803 (NRC); 10 C.F.R. §§ 205.170, .172 (DOE); 15 C.F.R. § 303.13(c) (ITA); 16 C.F.R. § 1051.8(a) (CPSC); 49 C.F.R. § 552.7 (NHTSA). But see 10 C.F.R. § 430.46.

49. See, e.g., 10 C.F.R. § 430.46(a) (DOE); 49 C.F.R. § 552.7 (NHTSA).

50. See, e.g., 21 C.F.R. § 10.30(i)(4) (FDA).

51. See, e.g., 14 C.F.R. § 300.2(b)(4)(v) (DOT).

52. See, e.g., 7 C.F.R. § 2901.5(b) (DOA, Energy); 49 C.F.R. § 552.6 (NHTSA).

53. See, e.g., 21 C.F.R. § 10.30(i), (j) (FDA).

54. See, e.g., 16 C.F.R. § 1051.9 (CPSC).

55. See 49 C.F.R. § 552.8 (NHTSA).

56. See 16 C.F.R. § 1051.7(c) (CPSC).

57. See, e.g., 21 C.F.R. § 10.30(e)(2) (FDA, 120 days); 24 C.F.R. § 1720.5(c) (HUD) (180 days); 49 C.F.R. § 211.11 (FRA) (six months); 49 C.F.R. § 552.8 (NHTSA) (120 days).

58. See, e.g., 16 C.F.R. § 1051.10(a) (CPSC) ("reasonable time").

59. See, e.g., 49 C.F.R. § 552.8 (NHTSA).

60. See, e.g., 21 C.F.R. § 10.30(e)(2) (FDA).

61. See, e.g., 24 C.F.R. 1720.5(c) (HUD).

62. See, e.g., 10 C.F.R. § 430.48(a) (DOE).

63. See, e.g., 14 C.F.R. § 11.27(k) (FAA); 21 C.F.R. § 10.30(e)(2)(iii) (FDA).

64. Id.

65. See, e.g., 21 C.F.R. § 10.30(e)(3) (FDA); 24 C.F.R. § 1720.5(c) (HUD).

66. Id.

67. See, e.g., 10 C.F.R. § 205.161(b)(2) (DOE).

68. See main text at note 433 supra.

69. See, e.g., 24 C.F.R. § 1720.5(c) (HUD); 47 C.F.R. § 1.407 (FCC). In some cases the regulations merely provide that the agency "institutes rulemaking procedures," see, e.g., 14 C.F.R. § 11.27(d) (FAA); 49 C.F.R. § 5.13 (DOT), or "open[s] a rulemaking." See 49 C.F.R. § 1110.2(e) (ICC).

70. See, e.g., 16 C.F.R. § 1051.10(a) (CPSC); 49 C.F.R. § 211.11(b) (FRA).

71. Compare 14 C.F.R. § 11.27 (FAA) with 24 C.F.R. § 3282.104 (HUD) and 10 C.F.R. § 430.43 (DOE).

72. See main text at notes 59-69 supra.

73. See 5 U.S.C. § 555(b) (1982).

74. But see, e.g., 42 U.S.C. § 6297(b)(4) (1982) (Secretary must prescibe final rule or deny petition in 6 months from date of filing, though there are provisions for extension of time).

75. See, e.g., 15 U.S.C. § 1410a(d) (1982).

76. See, e.g., 10 C.F.R. § 430.48(b) (DOE); 16 C.F.R. § 1.9 (FTC); 21 C.F.R. § 10.30(e)(3) (FDA); 49 C.F.R. § 552.8 (NHTSA).

77. See, e.g., main text at note 369 supra (FCC).

78. See, e.g., 49 C.F.R. § 211.11(b) (FRA).

79. See, e.g., 24 C.F.R. § 1720.5(c) (HUD).

80. See, e.g., 24 C.F.R. § 10.20(b) (HUD).

81. See, e.g., 21 C.F.R. § 10.30(e)(2) (FDA).

82. See, e.g., 16 C.F.R. § 1.9 (FTC).

83. See, e.g., 21 C.F.R. 10.40(g)(1) (FDA).

84. See, e.g., United States v. Nova Scotia Food Products Corp., 568 F.2d 240 (2d Cir. 1977). See also R. PIERCE, S. SHAPIRO, & P. VERKUIL, ADMINISTRATIVE LAW AND PROCESS 324-25 (1985) (suggesting this approach survives Vermont Yankee).

85. United States v. Nova Scotia Food Products Corp., 568 F.2d at 251.

86. *See*, *e.g*, 10 C.F.R. § 430.48(b); 14 C.F.R. § 11.27(f) (FAA); 49 C.F.R. § 552.10 (NHTSA).

87. *See*, *e.g.*, 14 C.F.R. § 11.27(h) (FAA).

88. *See*, *e.g*, 7 C.F.R. § 2901.5 (DOA, Energy); 10 C.F.R. §§ 2.803, 110.132(c) (NRC); 10 C.F.R. § 205.161(b)(2)(ii) (DOE); 14 C.F.R. § 11.27(f) (FAA); 15 C.F.R. § 303.13(d) (ITA); 16 C.F.R. § 1051.11(a); 21 C.F.R. § 10.30(e)(3) (FDA); 49 C.F.R. § 211.11(d) (FRA); 49 C.F.R. § 552.8 (NHTSA).

89. *See* main text at note 55 and Appendix A at note 60 *supra*.

90. *See*, *e.g.*, 42 U.S.C. § 6297(b)(4) (1982).

91. *See* 10 C.F.R. § 430.48(b) (DOE).

92. *See*, *e.g.*, 7 C.F.R. § 1.28 (DOA).

93. *See*, *e.g.*, 24 C.F.R. § 1720.5(c) (HUD) (7 days); 49 C.F.R. § 552.8 (NHTSA) (120 days of receipt of petition).

94. *See*, *e.g.*, 10 C.F.R. § 2.802(g) (NRC); 21 C.F.R. § 10.30(l) (FDA).

95. *See*, *e.g.*, 10 C.F.R. § 2.802(g) (NRC).

96. *See*, *e.g.*, 21 C.F.R. § 10.30(l)(5) (FDA).

97. *See*, *e.g.*, 16 C.F.R. § 1051.11(b) (CPSC).

98. *See*, *e.g.*, 24 C.F.R. § 10.18 (HUD) (final rule); 44 C.F.R. § 1.17 (Federal Emergency Management Agency); 49 C.F.R. § 553.35(a) (NHTSA).

99. *See*, *e.g.*, 21 C.F.R. § 10.33(b) (FDA); 47 C.F.R. § 1.429 (FCC).

100. *See*, *e.g.*, 49 C.F.R. §§ 211.29, .31 (FRA); 49 C.F.R. § 553.35 (NHTSA).

101. *See*, *e.g.*, 21 C.F.R. § 10.33(b) (FDA); 47 C.F.R. § 1.429(h) (FCC); 49 C.F.R. § 211.29(a) (FRA).

102. *See*, *e.g.*, 47 C.F.R. § 1.429(e) (FCC) (notice of receipt published in Federal Register).

103. *See*, *e.g.*, 49 C.F.R. § 211.31(a) (FRA).

104. *See*, *e.g.*, 47 C.F.R. § 1.429(b) (FCC).

105. See, e.g., 21 C.F.R. §§ 10.33(b), (d) (FDA).

106. Compare 21 C.F.R. § 10.33 with id. § 10.30 (FDA).

107. See 49 C.F.R. §§ 1.429(e), (f), (g) (FCC); 49 C.F.R. §§ 553.35, .37 (NHTSA) and Appendix thereto.

Appendix D

(Proposed Recommendations to ACUS Committee on Rulemaking, September 15, 1986)

1. Congress should review those statutes [other than the Administrative Procedure Act itself] which specify procedures for the receipt, consideration, and disposition of petitions for rulemaking in order to determine whether they improve substantially on the procedures already mandated by the APA and those recommended below to implement its provisions.

2. Congress should amend Section 553(a) of the Administrative Procedure Act to insure that the matters and functions specified therein are subject to Section 553(e). The procedures described below with regard to public solicitation of views should be utilized where appropriate by agencies engaged in rule-making of this nature.

3. Except to the extent that statutes otherwise require or provide, each federal agency should formally establish and publish a procedure for the receipt, consideration and disposition of petitions for rulemaking that includes, at a minimum, the following:

a. Specification of the address(es) at which petitions can be filed and the appropriate addressee(s).

b. Specification of the format of a petition, to require at least the name, address, and telephone number of the petitioner, the statutory authority for the action requested, a description in as precise terms as possible of the rule to be issued or repealed, and the arguments of law and policy and factual information deemed to support the action requested.

c. Except as provided in 4d and 4e below, solicitation of comments from the public both in support and opposition to the petition by means calculated to reach at least a representative cross-section of those persons likely to possess information that may aid the agency in its decision to grant or deny the petition.

d. Maintenance of a publicly available file with regard to the proceeding, which file should be assigned a docket or other control number and at the least contain the following: a copy of the petition; any comments and reply comments received; Federal Register and other public agency notices of relevance; correspondence to the petitioner from the agency which notifies it of the grant or denial of its request; correspondence between agency employees and others outside the agency with regard to the petition; hearing and meeting transcripts; and any documents, whether generated by the agency or others, which contain factual data which may be relied upon in the decision on the petition.

e. Timely personal notification to the petitioner of the grant or denial of the petition with reasons for the latter and public notification where it would serve a valuable purpose.

4. In drafting the requirements for the petition process, each agency:

a. should be as specific as possible with regard to both the type of information required by the agency in order to assess the merits of petitions and the issues that should be considered by petitioners in framing their requests;

b. should indicate its willingness to confer with petitioners prior to the filing of petitions regarding the requirements applicable to the content of petitions and otherwise, where feasible, provide assistance in preparing petitions;

c. should provide that if a petition does not comply with agency requirements for petition format, the petitioner will be clearly notified in a timely fashion of the nature of any deficiencies;

d. should specify that it will not engage in public solicitation of comments prior to a denial in cases where the matter raised in the petition has been mooted by other developments, subject to a recent denial of a petition for rulemaking filed with the agency, is clearly beyond the statutory jurisdiction of the agency, or is clearly frivolous; and

e. should indicate that it may omit the prior solicitation of comments and issue a final rule conforming to the petitioner's request where the agency favors the proposal and the APA or other applicable statute permits omission of the solicitation stage or that, alternately, the agency may issue a notice of proposed rule-making which conforms to the petitioner's request as the means of satisfying the requirement of solicitation of views.

5. Documents should be included in the petition file as soon as practicable after they become available to the agency. Where necessary, presubmission review by the agency of material included in petitions or other documents in the petition file should be authorized where claims of confidentiality are timely raised. The petition file should become part of the record for any rulemaking proceeding commenced in response to the petition.

6. An up-to-date public index of petitions should be compiled by each agency which lists, at a minimum, the name of petitioners, docket or control numbers, dates of filing, subject matters of petitions, and status and disposition of petitions.

7. In drafting regulations and internal staff directives applicable to the petition process, there should be clear cross-references to related material, coverage (in terms of type of rules) should be clear, and the multiplication of similar

statements should be minimized. The petition procedures should be comprehensive enough to cover all types of rules the agency has authority to adopt. In particular, petition procedures should be made expressly applicable to not only substantive rules but also general statements of policy, interpretative rules, and rules of agency organization, practice and procedure.

8. Agencies should interpret Section 553(e) of the Administrative Procedure Act as marking the grant of a petition at the time of issuance, amendment or repeal of a rule conforming to the request of the petitioner.

9. Agencies should establish time deadlines for the various aspects of the process for the receipt, consideration and disposition of petitions; tracking systems which disclose at the earliest possible time failures or prospective failures to meet those deadlines; and incentives to encourage staff to meet such targets. Congress should reconsider the desirability of those statutory provisions that impose strict time limits with regard to agency action on petitions.

10. Agencies should attempt to dispose of petitions as expeditiously as practicable consistent with their other statutory responsibilities and without undue sacrifice of agency-initiated rule-makings. Agencies should explore means to reduce delay in disposition of petitions, including delegation of decisionmaking authority with regard to both the grant and denial and streamlining the decision-making process to eliminate repetitive internal reviews and to provide for concurrent rather than sequential reviews.

11. Where feasible, one agency staff member should be designated as the contact person whom the petitioner and interested parties can contact for information relating to the status of the petition as well as other matters.

12. Where appropriate and feasible, agencies should consider collection of information in support of petitions where that information is not already possessed by the agency or furnished by the petitioner or the commentators.

13. Agencies should assure that final disposition of petitions by grant or denial occurs even when petitions have been folded into other rule-making proceedings.

14. Agencies should expressly indicate what procedural regulations apply to requests for reconsideration of decisions made with regard to petitions. They should structure those procedures in such a way as to minimize, as much as possible, the differences between the procedures governing petitions for rulemaking and requests for reconsideration.

15. Procedures in addition to those specified above should be adopted by an agency when there are special needs therefor. Any

further specification with respect to the format of a petition should take into account that persons lacking sophistication with regard to the agency and its procedures may at times file petitions. Overly detailed specifications may, therefore, be inappropriate. In short any format requirements should be strictly necessary in order to facilitate decision on the merits of a petition.

BACKGROUND REPORT FOR RECOMMENDATION 86-7

MODEL FOR CASE MANAGEMENT: THE GRANT APPEALS BOARD

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Report to the Administrative Conference of the United States

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MODEL FOR CASE MANAGEMENT: THE GRANT APPEALS BOARD

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I. RESEARCH GOALS

This project was inspired by a trio of articles which came to my attention in 1985. In that year I was ending two decades of teaching and practicing civil and administrative litigation. Over this span I had become increasingly disillusioned about the condition of our litigation systems. For me the "modern" Federal Rules of Civil Procedure had been amended into a hopeless and often meaningless series of pratfalls and pitfalls totally divorced from their opening hope, by now ironic, for the "just, speedy and inexpensive determination of every action."[1]. Indeed, this opening rule is one of the very few which by 1985 had not been amended into frustrating complexity.

I had come over the years to think of the Federal Rules as a productive fee factory for downtown lawyers and an esoteric playground for government and public interest lawyers. My extended travels in federal case law [2] strongly confirmed my sad impression that the Federal Rules, and their technical kin like standing, mootness and ripeness, were advancing the cause of gamesmanship with little public benefit besides challenging the intellects of some federal court lawyers and judges. The event of the states' unreflective adoption of the Federal Rules and of their by now biennial amendments exacerbated my concern [3]. No amount of "happy talk" from rule reformers [4] or the bench [5] could allay my concerns. My perception of reality had become quite different from theirs.

The domain of administrative procedure hardly offered a comforting refuge. The Administrative Procedure Act of 1946 is as unfathomable today as four decades ago, perhaps even more so given the innumerable judicial glosses [6]. Any one with a contrary view is cordially invited to teach my students, in one class period, the meaning and application of any one of the following, which are merely illustrative: "rule"; "substantial evidence"; "administrative record"; "ex parte contact"; or "clear error of judgment."

To be sure, thoughtful people were aware of the widespread and deep deficiencies in our procedural systems and began devising and testing alternatives long ago. Two of my mentors at Columbia Law School, Professors Maurice Rosenberg [7] and Walter Gellhorn[8], were at the forefront of reform efforts. Professor Mashaw offered a new, management-oriented view of adjudicatory "fairness" for the enormous administrative task of processing social welfare entitlements [9]. But those efforts, opposed by the natural conservatism and ingrained practices of bench and bar, had led to no more than tinkering [10] and substantial procedural reform seemed to be dying in the last ten years, possibly another victim of the national "status quo" thinking which swept our country after Watergate and Vietnam.

In 1985 Judge Jon Newman of the Second Circuit chose to analyze our civil litigation system in the Cardozo lecture he delivered to the Bar of the City of New York. In reading the version printed in the Yale Law Journal[11] I could hardly believe my eyes. Here they were, validated, the critiques, sometimes outbursts, I had been visiting upon my students for years! At last someone from above was yanking at the blindfolds of Lady Justice.

I felt similar exhilaration when reading President Bok's piece which was published earlier, though it was not widely publicized until 1985, and may have inspired Judge Newman [12]. Bok's analysis of the defects in our legal system was brilliant. But his piece did not have the focus and analytic power of Newman's. Bok gave me faint pulse but Newman set my still heart pounding.

Fittingly, the third inspiration came from another once-upon-a-time mentor at Columbia Law School: Professor Marvin Frankel. Always a scholar, he could not step from the trial bench into private practice without sharing his experiences with the legal world [13]. His explosive critique of our adversarial system, to him more aimed at hiding than revealing truth, further validated my thinking about the fundamental flaws in our adjudicatory way of life.

My opportunities to contribute to this marvelous movement were narrow, though my enthusiasm and energy boundless. I could join the exploding "Alternatives" movement by teaching Alternative Dispute Resolution ("ADR"), which I started to do in the spring of 1986. I could also take some information from my arcane specialty -- federal grant law -- and put it to use. While constructing the "law of federal grants," I came into close contact with an administrative court in the U.S. Department of Health and Human Services ("DHHS," "HHS," or "Department") called the Grant Appeals Board ("GAB" or "Board"). This Board was deciding cases, ranging in size from 29 dollars to over one hundred million dollars, with what seemed to me remarkable speed and accuracy. In 1981 the Board adopted a set of procedures aimed at processing cases in an efficient yet fair way. Here, perhaps, was an object of study, in a field where I possessed some expertise, which might offer valuable insights and information for the new wave of reformers.

Judge Newman and others had called for empirical studies[14]. While the Board was not an experiment but, rather, an ongoing adjudicatory system, and while scientific controls were absent [15], there had to be ways of gathering empirical data from Board cases which would enable me to make a systematic, fact-based appraisal whether the expectations underlying the 1981 procedural reform were being realized. With great help from the Board's leadership and from empiricists around the country, I designed a fact-based study of the Board's effectiveness and efficiency. Appendix B describes our project methodology.

Before plunging into the results of this study, I should try to place it in a broader context. Where does it fit amidst the court improvement efforts sweeping the country from coast to coast?

In general, the Board is an example of an adjudicatory system [16]. At the outset of each case, the Board offers litigants a mediation alternative. Once the parties reject the mediation alternative, as they normally do [17], the dispute gets resolved in the traditional adjudicatory manner. Facts are found in "on the record" proceedings, law is ascertained through briefs and argument, and a written, reasoned decision is rendered by a panel of three Board judges ("Member"). Relief is spelled "B O A R D" for grantees suffering financial disallowances or penalties; hence, the system does not have the voluntary choice characteristics of negotiation, arbitration and mediation. The Board is an imposed third-party intervenor with exclusive decisional power; consequently, the process differs from mediation and arbitration where parties pick the third person facilitator and decisionmaker, respectively. Nor do parties choose their own rules for deciding a grant dispute at GAB, or determine whether the Board decision will be final, which further distinguishes the Board's mode from arbitration, negotiation, mediation, or combinations thereof.

It is now clear that the Board has the classic characteristics of a court. And despite its "appeal," it is essentially a trial court which creates a factual record and decides thereon, the one exception being when it reviews small cases coming from other boards in HHS on a clearly erroneous standard [18]. GAB applies federal statutes, regulations and case law to disputed facts ascertained in a formal proceeding governed by a Board-fixed set of procedures. It has been vested with the exclusive power to make final decisions, reasoned in the judicial style, in certain categories of disputes arising under financial agreements between the Department and its customers.

Where the Board does distinguish itself from the typical court or administrative board is in the planned use of special procedures aimed at enhancing both efficiency and accuracy in the decisional process. These special procedures will be fully described and measured in later pages. For now it is enough to know that the Board uses a simplified process falling somewhere between the informality of small claims courts [19] and the formality of federal and state court practice. Its action-forcing deadlines, combined with firm judges firmly managed, keep cases moving swiftly towards resolution, although flexibility is retained to afford the process necessary for the correct decision of complex cases. While it will hear witnesses when necessary, the Board emphasizes documentary evidence over live witnesses, which partakes of the growing administrative practice of substituting depositions and affidavits for oral testimony whenever possible, an idea which has been proposed for mid-sized civil claims [20]. In its promptness of adjudication and simplicity of process the Board's dispute resolution strongly resembles court-ordered arbitration [21], but its tailoring of process to meet the varying complexity and stakes of its caseload weakens this comparison. Because the Board judges the distribution between public and quasi-public bodies of "public" dollars, one might be tempted to see in it a form of ombudsman [22]. But while the ombudsman merely recommends, the Board decides and, interestingly, the disputants before the Board fight as fiercely for "their" dollars as any corporate counsel in federal court. Finally, in the tight management of a case by the board member chosen to preside ("Presiding Member"), the Board resembles federal district judges and magistrates effectively using their pre-trial management powers under Federal Rule of Civil Procedure 16. This is the perspective we have chosen to emphasize and elucidate herein.

Judge Newman has called for empirical studies of fundamental ways to improve the administration of justice. This project is a small, humble answer to that call. In the tiny Grant Appeals Board, buried somewhere within a colossus Department and but a speck in America's justice machinery, may be found clues to help in the refashioning of our civil justice system.

II. DELAY AND INACCESSIBILITY:PROBLEMS OF AMERICAN CIVIL LITIGATION

Professor Geoffrey Hazard has constructed an ingenious argument which concludes, most surprisingly, that our American civil litigation system "can be considered very efficient." [23] That certainly is important news for court watchers. Given the large and ever-increasing volume of outcries from bench, bar, and the academy about the troubles of our court systems [24], Professor Hazard's is a lonely voice.

A tricky argument takes him to his surprising conclusion. First, he sees American civil litigation to be mostly "compulsory bargaining," which he characterizes as a positive implementation of the American value of individual autonomy and the American anti-authority ethos [25]. The problem is, of course, that court steps bargaining is a forced regimen, forced by the costs, delays, and uncertainties of the dreaded trial list. Where is free choice in any of this? [26] Are these legitimate outcomes? [27] And is there "efficiency" in a system where, after interminable positioning, posturing, threatening, and "discovering," the lawyers settle in a rush before entering the courtroom [28]?

Second, for those cases which reach bargaining impasse, Professor Hazard sees the American ideal of the rule of law and the achievement of justice being implemented inside the courtroom [29]. But which courtrooms? Certainly not those where most private citizens in America intersect with legal machinery. Not in major urban areas where the quest for justice is quixotic and often terrifying [30].

The flaws in Professor Hazard's reasoning are illustrated by the following. We could achieve the same result by imposing a high, arbitrary courthouse fee for the privilege of having an officer, vested with the court's authority, flip a coin and declare a winner. That too would force private bargaining and produce the same psychic satisfactions [31] currently offered by American civil courts, without the agonizing tribulations of trial. What is needed, of course, is a system of civil justice where, when invoked, the rule of law truly reigns and where parties are glad to enter as a true alternative to bargaining, mediation, arbitration, self-help, or claim abandonment.

Derisively labeling the literature concerning court overutilization as "hyperlexology,"[32] and challenging the data of the hyperlexologists as "naive speculation and undocumented assertion," [33], Professor Marc Galanter challenges the idea that there is too much law and litigation, the value judgment underlying hyperlexology ("floods," "explosions," etc.). Yet it is important to understand that his point is not that our court systems are healthy; indeed, he says nothing about that. Rather, his data indicate that while litigation rates have not increased appreciably over time, the type of litigation has changed [34], bringing, in combination with legal developments, an increase in pre-trial, trial, and post-trial complexity [35]. Professor Galanter sees the types of litigation and the changes in substantive and procedural law for judging and processing them as simply reflecting the new American community -- "multiple, partial, ... emergent ... urban." [36]

Thus, there is congruence between Galanter's data and the crescendo of voices warning of a "crisis in the courts." Most of the "crisis" literature is based upon personal experience. But what the writers may lack in empiricism they fulfill with reputation and experience. Accounts of unnecessary delays, costs, and access barriers, and of a decreasing quality of justice, have been voiced by renowned federal judges at all levels. Back in the Sputnik era Chief Justice Warren spoke of the "interminable" and "unjustifiable" delays in our courts [37]. Years later Chief Justice Burger characterized civil judgments, even when acceptable in result, as being "drained of much of [their] value because of the time lapse, the expense, and the emotional stress." [38].In what will undoubtedly be an important platform in the legal reform agenda for the coming decades, Judge Newman of the Second Circuit used the prestigious Cardozo lectures to call for a fundamental "rethinking" of the American civil litigation process [39]. He scolded the reformers for "bemoan[ing] the delays and costs of courtroom encounters while working mightily to refine the system in ways that make it even slower and more expensive." [40]. According to Judge Newman, we must abandon our customized procedural systems aimed at achieving an unattainable (because unknowable) fairness and move toward some type of efficient mass processing which will attain a higher quantity of justice from a global perspective.

Predictably, the strongest laments have come from the trenches: the trial bench. Judge Marvin Frankel stepped away from the federal bench, after a decade of trying cases, with many doubts about the validity of adversary procedures which often seemed to shroud rather than reveal truth: "But the play alone cannot be sufficient when the question is the doing of justice in real life." [41]. Other respected federal district judges have noted the adverse impact which lawyer control of litigation --the hallmark of adversary systems -- has, not only on achieving correct outcomes, but also on the achievement of efficiency in civil court [42]. The state trial bar has spoken too. In a moving account of the systemic injustices she observed in her years as a trial judge in the Philadelphia Court of Common Pleas, Judge Lois Forer sadly concluded that the key to "justice" was money. Only the rich could afford a decent trial of their cause.[43]

National attention on the "crisis in the courts" theme was achieved by a widely publicized writing from the academy. The prestige of the university was thrown into the fray when the President of Harvard University, formerly dean of their law school, attacked the fundamental flaws in our legal system which looked "grossly inequitable and inefficient" in offering "far too much law for those who can afford it and far too little for those who cannot."[44].

The experiential data of the judges, lawyers, and academics are being broadened now by empirical studies conducted by organizations like the National Center for State Courts, the Federal Judicial Center, and the Rand Institute for Civil Justice. Thus far, this research has focused primarily on the problems of delay and congestion [45]. We have learned for sure that there are many very slow and congested courts and that we are, indeed, in a worse position than in the past. This research is beginning to create necessary definitions, to understand the phenomena of court process, and to identify the determinants of delay and congestion. For example, research has uncovered the powerful role played by bench and bar attitudes -- the "local legal culture"--in producing delay and in resisting change [46]. It has taught us that action-forcing, enforced procedures have had positive results in some courts [47], that the individual calendar system offers considerably faster paced litigation than the master calendar system [48], and that the desire of some trial judges to advance the law through scholarly opinion-writing has conflicted with their duty to decide cases promptly [49]. This research is also casting doubt on some traditional explanations of court delay, such as court size [50] and caseload [51], as well as on the effectiveness of traditional cures, like settlement-prodding[52], adding judges [53], and restricting continuances [54].

III. CASE MANAGEMENT AS A SOLUTION

Perhaps three decades ago a "relatively new concept" [55] emerged as a means of unclogging courts and speeding up civil litigation: aggressive case management by judges. Judge Kaufman of the Second Circuit, then a trial judge on the Southern District of New York, offered the following rationale for this departure from the traditional view leaving case management in the hands of the lawyers:

> Primarily we seek means of ensuring justice and it has been the conclusion of all who have studied the problem that the best means to this end is an able and active judiciary. Contrary to what most of us have accepted as gospel, a purely adversarial system, uncontrolled by the judiciary, is not an automatic guarantee that justice will be done. ...[J]udicial intervention into the pre-trial preparatory procedures is built into the rules themselves and as such is now a recognized and accepted part of our legal traditions. Thus our "adversary system" is not pure adversity. To call it an "adversary sustem" alone is to misstate. It is an "adversary judicial system"; the Judge too has a function.[56]

Judge Kaufman perceived an "inexorable progress towards greater and greater judicial supervision" as the solution to the "crush" of litigation [57].

The federal bench produced many converts and zealots [58]. While new management techniques varied in details from courthouse to courthouse, an interventionist custom began to build up in certain chambers [59]. Judges started intervening of their own volition as managers of cases assigned to them under the federal "individual calendar system." [60]. They intervened early in the litigation and periodically thereafter, either in person or, increasingly, by means of telephone conferences [61]. They informed themselves about a case by studying its file and by questioning the lawyers. Their goal was to interject their informed judgment and experience to move a case along as quickly as was consistent with justice. They intervened with the following objectives in mind, each of which was backed, actually or potentially, with rulings: forcing early attorney preparation [62]; identifying areas of factual and legal agreement; sharpening of issues and elimination of doubtful claims and defenses; curtailment of unnecessary discovery or unreasonable blocking of legitimate discovery; discouraging futile motions and focusing legitimate ones; encouraging and guiding settlement discussions; and careful preparation for trial of those disputes which reached negotiation impasse.

The above is not to imply that strong judicial intervention is the invariable rule in federal court, only that some pioneering judges have seized upon this alternative as their way of coping, if not with the "crisis in the courts," at least with the one in their own courtrooms. Interviews with federal judges indicated strong disagreements about the degree to which it was appropriate for judges to manage a case [63]. For every activist, interventionist district judge, one could find another who preferred the patient germination of a case at the lawyers' discretion, or who perceived the attorneys as knowing far better than the judge how to try "their" case, or who thought cases, like wine, had to mature to settlement, or who thought pushy judges had a negative effect on settlement possibilities, or who thought his job was simply to try cases. These differing views were reflected in empirical studies which showed a wide variation among federal districts in case processing time and productivity. [64]

It is also important to note that active judicial management, either in person or through clerks and magistrates, must be combined with automatic, action-forcing procedures for optimum management results. It is intervention in the entire civil docket in a systematic way which decongests and speeds case flow, not impromptu management. Indeed, the Federal Judicial Center has concluded that it is the automatic action-forcing procedures which are the key producers of efficiency [65]. On the other hand, Judge Rubin believes that courts cannot rely on procedures alone. He states:

> Some highly productive courts set time schedules without conferences in each case. However, the conference procedure is more flexible, permits greater allowance for the needs of counsel in each case and requires little more court time [66].

IV. THE GRANT APPEALS BOARD

A. THE NATURE OF GRANT DISPUTES

We have warned elsewhere that the legal nature of the federal "grant" or "grant-in-aid" defies easy characterization, whether as a contract, as a trust, as a partnership, or as a gift [67]. For the purpose of identifying the nature of legal disputes which arise under grants, however, the most appropriate analogy is the enforceable agreement. The United States offers financial aid for defined purposes and under detailed conditions to states, local governments, universities, and non-profit organizations. The ultimate goal of grants is to support or stimulate these subnational and quasi-public units in the provision of a wide range of public services. In formally accepting such financial aid the recipient becomes a "grantee" and commits itself to honor all conditions of the grant, while the United States becomes obliged to pay the amounts promised in the way promised [68].

The United States Supreme Court has recently emphasized the quid pro quo nature of the federal grant in holding that only its direct recipient can normally be held responsible to honor the conditions of aid and not those who might indirectly benefit from an aided project [69]. The high court earlier had announced a doctrine of strict construction, against the United States, of the statutory terms of aid [70]. The Administrative Conference of the United States concurs in emphasizing the contractual nature of grants. In Recommendation 82-2, "Resolving Disputes Under Federal Grant Programs," the Conference asserted that "grants represent an understanding on the part of the federal government and the grantee that is in the nature of a contractual commitment."[71]

Most federal grants carry with them a vast array of "strings": conditions which must be met by the grantee. In another work we have characterized these conditions either as "programmatic," or "primary cross-cut," or "secondary cross-cut."[72]. We shall offer brief explanations of these technicalities because such definitions may help us understand the types of disputes which arise under grants and make their way to the Grant Appeals Board.

Each federal "program" has its unique set of rules defining how the particular aid may be spent. These are "program specific" or, more concisely, "programmatic" conditions. All grants but revenue-sharing are "categorical" -- available only for defined types of programs and projects -- and rules are needed to establish the parameters of the categories. This is accomplished by statements of purpose in grant statutes and regulations along with detailed specifications of ways in which the money may be spent.

Typically, the rules will define the categories of persons who may be helped by the program receiving federal aid. These will be the "eligible beneficiaries." For example, the United States asserted without success in a recent case at the Board that Louisiana had improperly used federal funds by serving 931 children in foster care who, the federal government claimed, were ineligible because OHDS had not given prior or simultaneous authorization of such care.[73] Grant rules will further specify the types of services which may be provided to the beneficiaries. These will be the "eligible services." To illustrate, does a child support program authorize the expense of sending sheriffs to bring non-supporting parents to court? The Board thought not in a case whose reasoning we have criticized [74]. Similarly, grant rules will define the operational activities which are supportable with federal aid. As an illustration, the United States would pay for efforts to collect money from third parties liable to provide for people who were medicaid-supported, but not for people who received medical care in programs wholly funded by the state.[75]

Dozens of additional programmatic conditions will serve to establish a program operation which accomplishes the objectives of the particular grant program. States and other recipients, for example, usually must have a "state plan" which is sometimes a boilerplate recital of assurance of compliance with assorted program conditions. One of these assurances might involve the development of a case plan for each beneficiary and periodic review of the individual's progress. Auditors would then use sampling techniques to determine the grantee's rate of compliance in the thousands of individual cases on its roles. This type of condition was involved in GAB Decision No. 706 in which the Board reviewed several specific cases in the sample and ruled that the State of Maryland had satisfied program conditions in three of eight contested cases.[76]

A "primary cross-cut" is a type of grant condition which serves to achieve a program's primary objective but which is found in many other programs. It is a "cross cut" because the condition cuts across many programs.

The financial rules attending federal grants are good examples of primary cross-cuts. One is the condition that the grantee share with the United States the financial burden of running the program. This is the "matching" rule, expressed in many programs as a percentage of "Federal financial participation" ("FFP"). Congress often uses variable matching rates to induce grantees toward certain activities by offering a higher FFP rate. States will then claim reimbursement under the higher rate for activities which are close to the line, leading to disputes which end up at the Grant Appeals Board. Some cases will illustrate. In one case Congress reimbursed ordinary administrative costs in the medicaid program at a 50% rate but then tried to get states to adopt computerized management systems by offering to pay three-fourths of the cost "attributable to the operation of" a Medicaid Management Information System. HCFA challenged New Jersey's allocation of certain indirect costs to MMIS and the state brought a winning appeal to the Board. [77] In a second case, also involving the medicaid program, Congress sought to induce "skilled professional medical personnel" into the program's management by increasing matching for their salaries from 50% to 75%. New York claimed the higher reimbursement rate for its health care fiscal analysts and auditors, who set compensation standards for medicaid providers, performed desk audits of claims, and did field investigations for rate appeals. The case was close, but the Board upheld HCFA's disallowance. [78] A third case involved a question "purely ... of documentation": In how many of 66 cases the California Department of Health Services had proved that abortions were for family planning, as opposed to miscarriages and medical necessity, thereby qualifying for 90% instead of 50% federal reimbursement. [79]

Disputes over matching, like those above, require the Board to ascertain the types of activities performed by the grantee and the types of personnel performing them and then to determine whether such people and activities "fit" under the statutory reimbursement standards. This is a typical kind of Board adjudication, as are disputes about whether the grantee in fact incurred claimed expenses, about whether outlays were countable as matching, and about other such budget matters. A great number of cases before the Board involve, in whole or part, review of the grantee's documentation of claimed expenses to determine whether the grantee has met its burden of proving its right to reimbursement.

Another set of primary cross-cuts is the cost principles. These are vast, detailed, and complex accounting standards which probably produce more disputes which reach the Board than any other type of grant condition [80]. The cost principles are too technical to be reviewed here, but some simple examples might help the reader understand the nature of a "cost principle" and the types of disputes arising under them.

For an outlay to be federally compensated, the grantee must demonstrate not only that it was actually made [81], but also that it helped achieve the purposes of the grant-aided program. In the language of cost accounting, the expense must be "allocable" to the program. Many cases at the Board involve fights about whether or not particular outlays carried out a program's objective. A clear example of an impermissible use is where a grantee "loaned" part of its Head Start grant funds to its other programs. [82]

Over the years the United States has developed dozens of detailed rules of "allowability" for categories of costs. Disputes involving these "selected items of cost" frequently make their way to the Board. [83]

Often the cost principle involved is whether a grantee's outlay was reasonable in amount. A humorous instance involved the purchase of 620 trash receptacles for $527 each by the Head Start Program in Puerto Rico,with no demonstration of what was wrong with the $55 model [84]. A dramatic dispute involving the reasonableness of cost arose from New York's retroactive adjustment of the fee schedule for certain medicaid providers. The state reexamined its reimbursement levels for 1974-1978, determined they were below true costs, recalculated them, and claimed $123 million in additional federal financial participation for the period. The HHS Grant Appeals Board rejected the argument of the United States that the original fee schedules were nonadjustable. Assuming that the final costs were reasonable, it held that the relevant statutes and regulations did not prevent a retroactive fee schedule adjustment. [85]

Should an aided program have certain income or rebates, such as tax refunds [86] or federal overpayments [87] or interest on undistributed collections [88] , the question becomes one of allocating "credits" between the financial partners. Similarly, interest earned on advanced grant funds must normally be returned to the United States, except if the grantee is a state. This rule has been the subject of a number of disallowances appealed to the Board.[89]

GAB also has jurisdiction over indirect cost disputes. Most grantees are now able to develop and negotiate with the United States a "cost allocation plan." This is a master plan for the measurement of indirect costs and their distribution among different programs run by the grantee. When the "cognizant" federal agency disagrees with elements of a cost plan, the dispute is properly brought to the Board. [90]

The third class of program conditions is the "secondary cross cut." These are grant rules which are usually attached to all or many grant programs and which have ends in themselves, ends which are sometimes in conflict with a program's primary purposes. Examples would be the nondiscrimination rules which cross-cutting statutes tag onto all "federal financial assistance." These prohibit discrimination in aided programs on the basis of race[91], handicap[92], sex[93], or age[94]. The Board does not enforce such secondary cross-cuts; jurisdiction lies in other offices such as the Office of Civil Rights in the various departments.

The Agency decision which will typically come to the Board is a fiscal disallowance.[95] An audit will have revealed, in the Agency's eyes, "unallowable" expenditures claimed by the grantee and reimbursed by the United States. The government will deduct the sum from the grantee's next payment or, if no future grants are in sight, demand repayment. The fiscal disallowance is usually finalized at the regional level after negotiations with the grantee. Regional directors have discretion whether to convert audit recommendations into fiscal disallowances, although they are under pressure from the Office of Management and Budget and the Comptroller General to recover misspent grant funds [96] and Congress has begun to withdraw such discretion by imposing mandatory fiscal penalties for certain grantee noncompliances.[97] The converse of a penalty is an "incentive" payment which Congress occasionally offers to lure grantees into certain activities. [98] Of course, withdrawal of an "incentive" payment when a state is found to have violated the incentive's conditions is functionally equivalent to a "penalty" or "disallowance."

The two remaining fiscal sanctions for violation of grant conditions are termination of the grant or voiding it. Termination may follow an Agency finding of substantial noncompliance [99], and a voiding may occur when the Agency discovers material misrepresentation in getting the grant. We found only three termination cases and one voiding action in our sample of 274 cases.

In summary, the decision which reaches the Board is normally a fiscal sanction, whether a disallowance, a penalty, a recoupment for grant ineligibility, a termination for noncompliance, a withdrawal of an incentive payment, or a voiding for misrepresentation. There will be a precise amount either to be repaid by the grantee or to be withheld from future allotments. Sometimes the Agency will lump together several fiscal sanctions, as when several distinct disallowances are recommended in a periodic audit. The questions before the Board involve reconstructing what the appellant-grantee did with grant funds, using documentation produced in the normal course of grant administration sometimes supplemented by testimony of program officials. After determining the grantee's conduct, the

Board judges whether such was authorized and reimburseable under relevant grant norms and, if not, whether the fiscal sanction imposed was correct in amount.

The dispute reaches the Board in a partially crystallized state. Typically, a regular [100] or special [101] audit will produce a report (and background documents) recommending certain fiscal action. After discussing the problem with the grantee and giving it an opportunity to submit rebuttal documentation, the regional director determines which disallowances or other adverse action he will take as the final agency decision. Important to our study is an understanding that grant disputes do not arrive at the Board in a raw, undeveloped state but, on the contrary, have already been processed for months, sometimes years, at the Agency level. While the extent to which grantees have had an opportunity to contest at the regional level will vary from case to case, it is safe to say that the grantee will have had some opportunities to be heard at that level before appealing to the Board.

B. ROLE OF GRANT APPEALS BOARD

Origin of Board

The Grant Appeals Board was created in the Office of the Secretary in 1973 [102], a year when the "E" still belonged to HEW [103] and when the vast outpouring of domestic assistance programs of the Great Society had reached its zenith [104]. Tens of thousands of small grants were being awarded annually at the discretion of agencies like the Office of Economic Opportunity, the National Science Foundation, the Manpower Administration in the Department of Labor, and the Law Enforcement Administration in Justice [105]. The undoubted queen of the discretionary grant was Health, Education, and Welfare. Through its Office of Education, HEW ran 29 distinct education programs; its Public Health Service awarded health research and training grants under 90 distinct statutory authorizations; and the Social and Rehabilitation Service operated 13 welfare related discretionary grant programs [106].

Grantees were pressing for a "greater measure of due process" [107] in the award and administration of these funds, and HEW responded by creating a mechanism in its highest office:

> [A] Departmental Grant Appeals Board from which Grant Appeals Panels would be selected for the purpose of reviewing and providing hearings upon post-award disputes which may arise in the administration of certain grant programs by constituent agencies of the Department of Health, Education and Welfare. [108]

The goal was to provide "fair or impartial review or reconsideration" of disputes between grantees and officials administering the Department's grant funds. [109]

It was a tentative, modest first step. The Board's originators totally lacked "any feel for the prospective size and complexity of the Board's caseload." [110] Against this backdrop of uncertainty, the Board's subject matter jurisdiction, as well as its authority, was sharply limited at the outset. The Board was given power with respect to programs making "direct, discretionary project grants." These programs were large in number but small in dollar outlay. Any other type of program -- for example, a "state plan, formula program" [111]--had to be specially designated for Board jurisdiction by the Secretary and the head of the operating division.

Nor could the Board decide any dispute within the covered programs. For example, apart from the narrow category of noncompeting continuation awards, the Board could not, and still cannot, review the fundamental decisions whether to award a grant or how much to award. [112] The types of disputes which could be brought to the Board were:

1. noncompliance terminations of grants, in whole or

part;

2. disallowances based upon unallowable expenditure or inadequate documentation;

3. disapproval of a request to incur an expenditure [113];

4. voiding of a grant; [114]

5. decisions concerning indirect cost rates and certain other rate determinations. [115]

The power of the Board was limited in two additional ways. First, the Board's decisions were essentially advisory. If the head of the operating division ("Constituent Agency" or "Agency") was displeased with the result, he could reverse or modify it, though it was hoped that a "reasons requirement" [116] would curtail arbitrary action. [117] It also looked like the Secretary himself could reverse or modify the Board without offering any reasons. [118]

Second, the Board could not hold Department rules nor statutes to violate the Constitution. This was accomplished by a clause in the original Board charter which stated that "[t]he Panel shall be bound by all applicable laws and regulations." [119] This did not stop the Board, of course, from interpreting its way around possible conflicts. And it is still an open question, according to one Member, whether the Board may void a regulation in plain conflict with an applicable statute.

Neither the original charter nor the 1975 revision [120], which added "Subpart B --Practice and Procedure" -- contained much in the way of procedural innovation. On the contrary, the authors explicitly chose their model from the Federal Administrative Procedure Act of 1946:

> This decision and review structure follows procedures customarily used by Federal agencies for review of hearing decisions under the Administrative Procedure Act and is designed to afford to aggrieved grantees maximum due process and to the heads of the constituent agencies the benefit of a full record before a final decision is made in disputes between grantees and employees or officers of the agency. [121]

The power of the panels to judge that no material facts were in dispute and to proceed thereafter by means of an informal conference [122] were already respected facets of the administrative process. [123]

Growth of the Board

Possibly the most significant event in the Board's history was the extension of its jurisdiction, starting in 1978, to disallowances within formula grant programs. [124] Most of DHHS's large, state plan-formula programs are now included, medicaid and public assistance being the most significant.[125] This converted GAB into a major league player. From an anonymous board handling "nickle and dime" disputes, the Board began fielding multi-million dollar claims, many of which involved public law issues of great national importance. To the Board also came new players: the litigating offices of the great state health and welfare agencies like the Departments of Social Services of New York and California. Table 4A illustrates this caseload growth:

TABLE 4A: BOARD APPEALS AND WRITTEN DECISIONS:1973-1985

Year	No. Appeals*	Dollars Appealed	Written Decisions
1973	15	$ 286,839	20
1974	23	$ 1,305,537	
1975	21	$ 12,315,506	16
1976	19	$ 484,911	15
1977	24	$ 681,465	17
1978	163	$ 69,742,235	84
1979	243	$ 511,284	104
1980	189	$ 918,667	109
1981	221	$ not available	135
1982	254	$ not available	127
1983	288	$ not available	161
1984	257	$ 569,667,443	150
1985	275	$ 588,563,015	n/a

* Slightly overstated because requests for reconsideration are docketed as separate appeals.

A second significant development was the vesting of final decisional authority in the Board in 1981. [126] This was probably more of a psychological than a substantive boost. No Board decision had ever been overturned by the head of a Constituent Agency or the Secretary between 1973 and 1981.[127] Still, the Departmental power had loomed above the Board, and litigators had the uneasy feeling that their winning advocacy could be obliterated by a stroke of the pen. [128]

The vesting of final decisional authority in the Board acquired even greater significance when the Southern District of New York held in 1980 that disallowance disputes had to be processed through the Board before being brought into federal court.[129] Thus, at the beginning of this decade not only was the Board "the only game in town," but it was also a game which had to be played! Before seeking judicial review in federal court under the Administrative Procedure Act, 5 U.S.C. $702, a DHHS grantee must first process its complaint through the Board.

C. BOARD PROCEDURES

Procedural Reform

The Board's "charter" was considerably revised in 1981 for the purpose of creating a modern procedural system [130]. The hope was to design a quick, fair, flexible, and easy-to-understand set of procedures. The drafters sought to imbue their procedures with the following attributes: a "fast" decision, measured against normal court or bureaucratic processing time; a "final" decision -- final at least at the agency level; an "expert" decision; a decision produced with less than ordinary cost and time consumption; decisions less likely to be litigated further -- meaning, presumably, high grantee satisfaction with the process and the results, regardless of outcome; a better administrative record for sound judicial action on review; a process resistant to the pressure of political intervention; and a process which offered a healthy forum to expose, analyze, and resolve specific grantor-grantee problems of a serious, recurring nature [131]. In the following paragraphs we outline the new procedures which were in fact adopted in 1981 and are currently in force.

Regular Process

Three distinct methods of dispute resolution were instituted by the Board, which we can call "simple," "regular," and "complex," but most cases are assigned to the regular process. We shall describe the regular process in some detail, then compare and contrast the alternative procedures. Cases are channeled into expeditied or regular process by the Presiding Member in the letter acknowledging the appeal. Parties occasionally try to convince the Board that their controversy deserves a higher level process, such as a formal evidentiary hearing, and have had some success.

Two factors, revealed on the face of the notice of appeal, determine the appropriate process: amount-in-controversy and fact or issue complexity. The Board retains flexibility to "enhance" its review by allowing oral hearings under special circumstances, and in our case sample exercised this option 17 times. On four occasions the Board rejected an appellant's claim that material facts could only be established by the witness examination, cross-examination and confrontation which a traditional trial format affords. While the Board vigorously pursues its goal of efficiency by officially posturing against requests for slower, more costly procedure, it in fact grants more complex process upon an appropriate showing.

All cases start with an appeal from an Agency decision. The Department has formalized by regulation the process its operating components use to notify and finalize their decisions in grant disputes [132]. Such official notice, a "final written decision"("agency decision"), is to contain a complete statement of the background and basis of the decision, including references to applicable laws, and enough information to enable the affected party and potential reviewers to understand the issues and the Agency position on them. This format was imposed as an important part of the 1981 procedural reform, and the Board has not hesitated to police this regulation by returning nonconforming notices to the Agency with instructions to cure the defects identified by the Board.These rules aim to impose more "discipline" on the operational arms of DHHS by requiring them to identify issues in dispute clearly, make sincere efforts to resolve them, and, in cases of impasse, create a document "containing a complete and concise factual and legal basis for the agency's action." [133] At a minimum such a decisional process would provide a firm foundation for an appeal, and it might even produce better decisions, thereby eliminating such appeals [134].

After receiving the agency decision, a grantee has 30 days to bring the dispute to GAB by means of a "notice of appeal"("notice"). The Board has not issued a special form, but requires simply that the notice contain: a copy of the agency decision, an indication of the amount the grantee claims is in dispute, and a "brief statement of why the decision is wrong." The Board liberally allows appellants to correct defects in the notice, such as not including the agency decision, as long as the appeal appears to be timely. We found wide variety in the notices, from simple one paragraph pleas to 20 page technical legal arguments. A fair number of such notices are filed by non-attorneys who are not versed in standard legal formats.

Ten or fewer days later, the Board sends an acknowledgement of the appeal ("acknowledgement"). This, we shall see, is a surprisingly important event. In addition to their perfunctory tasks of sending appellant a copy of Board procedures, notifying the Agency ("respondent") of the dispute, offering the parties a mediator, and informing the parties of what's next -- usually the submission of a brief and appeal file by appellant -- acknowledgements often begin the case management process. In many instances the Presiding Member has before him or her, in the notice and agency decision, considerable information about the dispute. He or she can begin to identify the legal issues, see which facts are agreed to and which are in dispute, and sense the types of documentation which are likely to be available. A fair number of the Board controls we discuss in Section VI are interjected in the acknowledgement [135]. Here we also find the tentative assignment of a case to a procedural track.

In the regular process the next event in the preparatory phase of the case is the creation of an appeal file, with accompanying arguments. The Board perceives its "basic process" as "review of a written record (which both parties are given ample opportunity to develop) consisting of relevant documents and statements submitted by both parties."[136] Thirty days after the acknowledgement, appellant submits both its appellant's brief and an appeal file [137]. In practice, the appeal file is typically an appendix to the brief and is used as a source of fact citations in the brief. The Agency then has 30 days to submit a respondent's brief and a supplemental appeal file [138], the latter usually being in the form of an appendix to the respondent's brief.

This is obviously an important case management phase. Here, not only do most material facts surface, but legal and fact issues begin to crystallize. Not surprisingly, the Presiding Member will often intercede with information demands. Parties will be instructed to answer, either in the appellant's reply or in special submissions, multiple questions to clarify their positions, as well as being pressured to make fact and legal admissions which seem reasonable from the face of the documents and arguments submitted [139]. It is important for the Board to have, at this phase, as complete a documentary file as possible. The Board recognized, while planning the procedural innovations in 1981, the central role to be played by the appeal file:

> While in the past the accumulation of documents submitted to the board over time effectively became an appeal file, the procedures now would make it clear that there is a responsibility early in the process for both parties to properly organize and submit relevant documents, and that the appeal file is the documentary heart of the record reviewed by the Board [140].

Of the cases we studied, 140 reached the stage when an initial appeal file is submitted by appellants. Pages in these files totalled 12,326, for an average of 88 and a median of 51. In these 140 cases, either the Agency or the appellant, or both submitted supplemental documents for the appeal file 109 times. Such supplemental submissions totalled 10,609 pages, with an average of 97 pages and a median of 49. All together, 140 cases produced a total of 22,935 pages of documentary evidence, for an average per file of 164 pages.

Once briefs and documents are submitted and the Presiding Member's questions answered, many cases on the regular track are in fact ready for disposition. When the parties agree, the case is then decided on the written submissions -- either finally or semi-finally by means of an Order to Show Cause which gives the party targeted for defeat a last gasp argument [141]. According to one Member, the device of a show cause order or tentative decision is less frequently employed at present than in the early years under the new procedures. We counted 55 instances in our 1981-1985 sample of 274 cases [142].

When the "informal conference"("conference") is the next stage of the preparatory process, the Presiding Member takes firm command [143]. The rules, indeed, plainly recognize this authoritative role: "The informal conference primarily involves questioning of the participants by a presiding Board member."[144] Typically, he or she issues a series of questions to be addressed seriatim by the parties, either by their lawyers or by their technical experts or by both [145]. When conducted in person, these conferences resemble more a roundtable discussion than a trial. Their purposes are:

> To give the parties an opportunity to make an oral presentation and the Board an opportunity to clarify issues and question both parties about matters which the Board may not yet fully understand from the record [146].

While appellant usually starts the response to each question and the Agency then talks, there are frequent interruptions by Board questions, comments, and clarifications. After formal responses to the planned inventory of queries, a free flow conversation takes place among all present, including individuals who are program experts. The Members call these people "participants" instead of "witnesses" because they provide information not related to disputed facts but rather background material which helps explain a party's position. Ever increasingly, the Board has come to rely upon audio-taped telephonic instead of in-person conferences [147]. We recorded whether conferences and hearings were conducted by telephone or in person and found an 80% use of the telephone. The conference call phone system simply substitutes for the table, the free-wheeling format being essentially the same.

The normal case then moves directly to decision. The Presiding Member may ask for proposed findings and conclusions [148], but we noted no instances of this in the case files. More typically, the Board will send a "tentative decision" to the parties for their comments. Also, an occasional post-conference query was posed to one or both parties when a review of the conference transcript [149] revealed a fact lacuna or legal ambiguity.

Simple Process

For small stakes cases, $25,000 or less, an even simpler, faster process exists. If an HHS Agency has already conducted a formal review process by a board or other relatively independent reviewing authority, which resulted in an on-the-record decision, this record is forwarded to the Board for what is, essentially, appellate review under a "clearly erroneous" standard. After receiving the acknowledgement, the Agency sends the Board the record below, the appellant submits a statement why the decision below was clearly erroneous, and the Agency may, if it wishes, submit a statement defending the decision below. These submissions are all to be made within 30 days of the acknowledgement. These cases are, therefore, prepared for decision within 40 days of the notice of appeal, unless the Board exercises its discretion to "allow or require the parties to present further arguments or information." [150] One Member said in an interview that when she sees that new matters are raised in the notice of appeal, she will require the Agency to respond to them, thereby adding an unprogrammed step to the process.

The other category of simple process is comprised of cases worth $25,000 or less which have not had a formal [151] prior review. In these cases each party has 30 days from the acknowledgement to submit short arguments -- ten pages or less -- and relevant background documents. Each party then gets to respond orally to the other's submission in a telephone conference arranged by the Presiding Member. Assuming further proceedings, briefs, or submissions are not allowed, these cases are ready for decision in less than two months.

We thought we would encounter requests for conferences or hearings in "expedited" cases under the authority of 45 C.F.R. §16.12(b) but were mistaken. We coded for requested conferences but only found five requests for a prehearing conference (all granted) in cases scheduled for a hearing on the merits. In the 26 cases in our sample processed on the "expedited" track, no appellant sought a live hearing or conference. This seems to confirm the Board's judgment that the amounts involved in such cases do not justify complex litigation methods.

Complex Process

The rules provide a formal hearing process in which witnesses may be cross-examined and rules of evidence applied. This process applies to cases in which (1) complex issues or disputed material facts are found and (2) the Board believes an adversary, evidentiary format would assist its decisionmaking. The Board explicitly discourages requests for oral hearings because of their expense and time-consumption [152]. Although this conclusion is based on an express statement in the Board's charter, Members emphasized in interviews that they discourage evidentiary hearings only when they believe them unnecessary after studying the case file.

In our case sample we located 20 instances in which a party filed a written request for a formal fact hearing. The most common disposition (n.9) was for the Board to convince the party that a telephone conference would serve its needs, with the party then withdrawing its request. Parties typically make an immediate request for a hearing to preserve their options, then quickly recede when it becomes clear that an evidentiary hearing will not advance their cause. On six occasions the party's request for a fact hearing was granted, while four times it was denied. In the remaining case the appeal was withdrawn before the Board acted on the request.

The above data suggest that a persistent party stands a reasonable chance in getting a formal evidentiary hearing before the Board, though the instances are too few to be definitive. In an interview, the Board Chair stated that a party's non-frivolous request for an evidentiary hearing will be granted, although the Presiding Member may try to steer the parties toward a different process.

In eleven other cases the Board and the parties agreed, without a formal written request, that a fact hearing was necessary. All together, then, only 17 of 137 dockets which were fully adjudicated used a formal, evidentiary hearing. Apparently, the Board and its litigants agree that traditional trial arts add little to the decisional process in most cases. In a later section we discuss the types of issues presented in Board cases and how they rarely involve strong fact conflicts and credibility problems, thus lessening the need for cross-examination of witnesses.

Mixing, Matching, and Inventing

In practice the boundaries between the three procedures are not as clearcut as would appear from the face of the Board's rules. The Members have, not surprisingly, tailored procedures to the exigencies of each case without overly worrying about the "track" to which the case has formally been assigned in the acknowledgement. For example. we found widespread use (n.19) of a "hybrid" conference: One in which the parties are permitted to have witnesses testify and be "cross-examined" within the structure of an informal, telephonic conference. Indeed, it was sometimes the case where a conference scheduled for the answering of questions posed by the Presiding Member to the parties served to build the fact record by way of new evidence presented orally. This frequent use of a hybrid mixture of "hearing" and "conference" possibly explains why the pure trial-type format is employed so infrequently. The hybrid serves as an alternative method, presumably perceived as superior by Members, of getting to facts which did not appear in the documentary appeal file. It also minimizes the Members' need to be precise about the process chosen.

Similarly, the rules led us to expect to find in-person conferences [153], with the prior planning being done by telephone. Instead, we found that the substantial majority of conferences, 80%, were both planned and conducted by telephone. Apparently, the Members have been so satisfied with the telephone hearing that it has become the standard "trial" format at the Board. We also encountered in many cases "summaries" of telephone conferences (n.38), as opposed to the verbatim transcripts one would otherwise expect (n.21). This cost-saver seemed to provoke little opposition, presumably because the summaries accurately portrayed the substance of the testimony and arguments at the conference. Because 70% of the conferences involved only legal arguments based upon uncontroverted facts of record, the "summaries" were typically of legal analysis rather than factual testimony and, therefore, unlikely to provoke dispute or demand precise attention to detail. In the balance of cases conducted by telephone conference, the Board does nothing beyond sending the audio-tape to the parties on request.

Members are not shy about using their broad procedural powers to create the procedures necessary for circumstances unforeseen in the rules. A good example is the "summary decision." When an identical disallowance question surfaces again for a different audit period, the appellant knows the Board will follow its precedent and simply wants a quick decision so it can demonstrate "exhaustion of administrative remedies" to the court in which it seeks judicial review. The practice of the Board now is to grant such summary adverse decisions upon request. We found eight such requests, all of which were granted.

Board Members

Proceedings are directed by the Member chosen by the Board's Executive Secretary. GAB's efficiency, effectiveness, and reputation were considerably enhanced by the switch over time from part-timers, trying to handle Board cases in the cracks within their normal work schedules, to five Members whose exclusive work is that of the Board [154]. The Member has the typical catchall authority of an administrative hearing officer "to take any other action necessary to resolve disputes in accordance with the objectives of [Board] procedures." [155] His or her specific powers include: issuing orders; examining witnesses; taking the steps necessary to conduct an orderly hearing; ruling on motions; staying cases; giving justified time extensions; using the dismissal sanction to enforce deadlines, orders, and rules [156]; ordering or assisting the parties to submit relevant information; remanding to the Agency for further, specified action; and waiving or modifying procedures in a specific case upon prior notice to the parties.

Cases are decided by panels of three [157], unless the case is summarily disposed of before the remaining two panel members are named. The panel is assigned at a time when the Presiding Member needs consultations about the merits, management problems, or procedural rulings. This may be early or late, depending on case needs. The panel needs to be constituted before an evidentiary hearing so that the additional Members can attend should they so choose. Members feel free to solicit ideas with each other whether or not the consulted Member is on a panel.

When the case is ready for decision there is lively interaction between panel members. While on site visits, we observed animated discussions between panel members on points of law and fact. It is true that the Members rarely issue concurring or dissenting opinions [158], but one should not be misled into thinking that the first and second signatures [159] on panel opinions are merely rubber stamps. Even though consensus on the result and reasoning may have been ultimately achieved, considerable "give and take" and "bending" likely preceded it.

Staff

Professional staff attorneys are assigned to cases by the Executive Secretary and typically play an active role in case preparation and management.[160] They do file review, document drafting, and conference arrangements. As is the case in judge-clerk relations, the extent to which a Member depends upon his or her assigned staffer depends upon the particular personalities.

The professional excellence of GAB staff attorneys is proved by the high opinions of the attorneys with whom they deal. Our questionnaire respondents rated the staffers an average of 7.1 on a 1 to 10 scale, with a median score of 7.4. Of 117 respondents, only eight attorneys rated GAB staff lawyers below average.

D. PORTRAIT OF BOARD'S WORK

At the close of business on December 31, 1985, in its thirteenth year of existence, GAB had received 1,992 appeals. This was an average of only 153 per year, less than one every other day. But the yearly caseload average after 1977, when the Board began adjudicating disallowances within formula grant programs [161], was 236 per year, compared to 20 per year in the first five years of GAB's existence, 1973-1977. Also, our study showed that the average dollar value per case was $1,169,000, meaning that every year from 1978 to date, the Board adjudicated rights to an average of $275,884,000, more than one-quarter of a billion dollars annually [162].

In the following table we see the range of dollar values in the 274 cases which comprised our 1981-1985 sample. For the sample, the total dollars appealed were $313,195,000, with a mean of $1,169,000 and a median of $125,500. The table clarifies that the average case value is pushed considerably above the median by several controversies involving tens of millions of dollars.

Table 4B: DOLLAR VALUES OF CASES

Dollars (000's)	No. of Cases
0-25	72
26-50	18
51-75	22
76-100	13
101-200	25
201-300	15
301-400	14
401-500	5
501-1,000	28
1,001-10,000	45
10,001-28,117	6

There were fourteen cases with a "0" dollar value. These would involve issues which had not yet translated into monetary amounts, such as rejection of a grantee plan for the reimbursement of future indirect costs.

We see in Table 4C that the bulk of the litigation at GAB is between the United States and state agencies over dollars granted in the large formula programs such as medicaid and AFDC.

Table 4C: AVERAGE CASE VALUES PER PROGRAM

Program	Statute	Total Dollars	Average Per Case	Cases
medicaid	SSA, 19	212,282,000	1,814,000	117
AFDC	SSA,4-A	36,806,000	1,937,000	19
social services	SSA, 20	11,509,000	1,644,000	7
child welfare	SSA,4-B	1,985,000	661,000	3
child support	SSA,4-D	1,858,000	103,000	18
supplemental security income	SSA, 16	13,938,000	13,938,000	1
Headstart	Headstart Act	8,102,000	172,000	47
Low-income energy aid	LIEAA	381,000	63,500	6

A significant percentage of cases and appealed dollars are resolved by dispositions short of full-cycle Board adjudication. [163] Table 4D below shows the breakdowns. "Jurisdiction" means dismissal for lack of Board authority over the appeal. "Appeal withdrawn" means the grantee chose not to pursue the case. "Settlement" means a voluntary resolution between grantee and Agency. "Dismissal with prejudice" means the grantee gave up its claim or lost because of procedural noncompliance, while "dismissal without prejudice" is a withdrawal that permits later reinstatement of the appeal. The latter is a technique used to permit settlement discussions or the resolution of key issues in similar cases without having the appeal clog the Board's docket. "Other" is a miscellany comprised of decisions based on reasons like ripeness, lack of a valid cause of action, and Agency withdrawals of the disallowance.

Table 4D: SUMMARY DISPOSITIONS

Type	Count	% Sample	$ Appealed (000's)	Mean (000's)
Jurisdiction	11	4.0%	6,292	572
Appeal Withdrawn	37	13.5%	10,321	279
Settlement	60	21.9%	64,174	1,069
Dismissal w/Prejudice	8	2.9%	1,309	164
Dism. w/o Prejudice	16	5.8%	18,631	1,164
Other	5	1.8%	740	148
TOTAL	137	49.9%	101,467	741

Two important conclusions can be derived from Table 4D. First, the summary disposition cases comprise half of the Board's workload, and, therefore, are sure to have an important impact on the Board's "efficiency" quotient. We shall later analyze the time and effort necessary to resolve these "summary" cases and compare this data with full-cycle adjudication. [164] Second, while the number of such resolutions is large, the total dollars resolved by such shortcuts--$101,467,000--was about one-third of the total dollars in dispute in the case sample ($313,195,000). This is a simple reflection of the fact that the mean value of shortcut cases ($741,000) was almost one-half of the mean value of full-cycle cases ($1,506,000) [165] and two-thirds of the mean value of all cases in the sample. The interesting revelation here is not that the stakes in truncated cases are smaller: that is a normal litigation pattern. What is important is that the gap between dollars resolved summarily and those fully adjudicated is as small as is shown.

The percentage of full settlements, 21.9%, is not impressive considering the comparable federal and state court settlement rates. The dollars settled figure, $64,174,000, is also about one-fifth (20.5%) of the total dollars appealed. Later we will speculate why Board cases are more prone to be adjudicated on the merits than to "settle out"--a stark comparison with normal state and federal civil litigation. [166] In contrast, 66.8% of the appealed dollars ($209,177,000) were awarded by full-cycle Board decision. The unsettled balance was decided summarily through jurisdictional, ripeness, and procedural dismissals, abandonment of the appeal, nonprejudicial dismissal, and Agency withdrawal of the disallowance.

We tracked the "process" used for each case: special expedited; expedited; written submission; conference; hybrid conference; and hearing. [167] Table 4E below reports the results.

Table 4E: UTILIZATION OF PROCESS

Process	#	%	$ Appealed: Mean (000)
Special Expedited	7	5%	9
Expedited	19	13%	19
Written Submission	45	30%	824
Conference	44	29%	1,753
Hybrid Conference	19	13%	
Hearing	17	11%	4,172

The data confirm the procedural theory that the most valuable cases will be assigned to the most complex processes. The first column lists the process in order of increasing complexity. We would expect the dollar value of cases to increase in the same direction, and the right hand column in Table 4E soundly confirms our expectation.

We also recorded whether conferences and hearings were conducted by telephone or in person. We found an 80% use of the telephone. Seventeen in-person hearings or conferences were held in the 274 sample cases; only 6.2% of the docketed appeals. When a case's issues are few and not factually or legally complex, the Members appear to steer the parties towards a telephone conference.

Who wins Board-adjudicated dollars: United States or grantees? We entered for each case the distribution of awards between the U.S. and its grantees and discovered that of 184 disallowances adjudicated by the Board, the United States won 171 times, in whole or in part, for a value of $151,450,000, while grantees won 74 times, in whole or in part, for a total value of $31,118,000. In short, the United States won five of every six dollars adjudicated by the Board. The average federal victory was $1,515,000, while the grantee average was $421,000. The median federal victory was $127,000, while grantees had a $65,000 median. In 37 cases the Board remanded for further proceedings at the agency level. These were normally determinations, following the Board's instructions, of the precise amounts owed by one side to the other. Most of these remands never returned to the Board, making it infeasible for us to trace these dollars. The "balance," however, is small:

Adjudicated U.S.	:	$151,450,000
Adjudicated Grantee	:	$ 31,118,000
Remanded Dollars	:	$ 26,609,000

We went back to our original data sheets to confirm the above data. We found that case results did, indeed, heavily favor the United States. In cases which went full cycle to a Board adjudication, the United States won 86 disallowances and 17 "split" decisions --with the amount awarded to the grantee usually being minor. On the other side, the grantees won only 18 disallowances outright, and 5 "split" decisions. This is a 105 to 23 "win" ratio favoring the United States, just about the same ratio as "dollars adjudicated." This corroborates an earlier report which found that the United States won three of every four cases in the period from 1973 through 1980 [168].

When we toss in the results of cases which short-circuited against the grantee, for example jurisdictional dismissals and withdrawals of the appeal, the scorecard is even bleaker for the grantee community. In our case sample there were 55 of these results, which bolsters the win-loss ratio in favor of the United States to 160 to 23.

Grantees were able, however, to achieve a favorable settlement in a significant number of cases. In 40 cases, settlement terms favored the grantee, while in five cases the terms were more favorable to the United States. These cases were typically of small dollar value, rarely reaching six figures.

The typical case litigated at the Board is a medicaid disallowance of significant size disputed by one of the major state social service agencies. The average value of a state agency appeal is $1,564,000. The list of appellants is headed by the New York State Department of Social Services with 33 appeals in our sample, followed by New Jersey (15), Ohio (13), Pennsylvania (13), and Illinois (10). California's Departments of Health Services and Social Services brought only seven disputes to the Board in this period, making us wonder whether geography discourages some appeals. One Member thinks not. In an interview she stated that fewer appeals may be filed by these California agencies because they involve themselves aggressively in the audit process, thereby making Board appeals unnecessary by achieving favorable resolution at the earlier stage.

For every multiple user, there is a "one shot" appellant: 103 of the appeals were brought by parties who appealed no other case. As shown by the following table of types of organizations appealing, many of these "one shot" users are non-profit organizations.

Table 4F: CATEGORIES OF APPELLANT ORGANIZATIONS

Category	# Appeals	%	Total $	Average $
state agency	196	72%	305,027,000	1,564,000
non-profit	58	21%	4,924,000	86,000
local govt.	12	4%	2,240,000	249,000
university	5	2%	911,000	228,000
Indian tribe	3	1%	93,000	31,000

On the other side of the "v." we find only five entities within HHS doing substantial defense work at the Board. The Health Care Financing Admistration ("HCFA") defended 119 medicaid cases, 43% of those in the sample. The Office of Human Development Services ("OHDS") was respondent in 79 cases (29%) under four different programs: AFDC (19), Social Services Program (7), Headstart (50), and Child Welfare (3). The Office of Child Support Enforcement litigated 20 appeals (7%) under Title IV-D, Social Security Act. The Public Health Service responded in 19 cases (7%) and the Social Security Administration in 18 cases (7%), both defending disallowances under assorted statutes. A variety of entities within DHHS handle the balance of appeals.

The great bulk of the appeals, 251 of 274, involved fiscal disallowances. While the Board has jurisdiction over several other types of disputes [169], only a handful of appeals, 8%, involved such other disputes.

With numerous different grantees appealing cases, many only once in the 43 months covered by our sample, and only a few responding agencies, one would expect the United States to have the upper hand in litigation experience which, in turn, might partially explain the federal government's five-to-one win ratio. We recorded each attorney's name for each case, allowing us to determine the litigation experience of each for the cases in the sample. Based on the data in Table 4G below, we quickly see that the United States infrequently defends its allowances with inexperienced lawyers. Indeed, in 147 cases of the 232 in which the U.S. was represented by a lawyer, the U.S. attorney had at least one prior case before the Board, and in 107 Board cases out of 232 (47%), the legal representative of the United States had already litigated three or more cases before the Board. On the other hand, the grantees had such veteran lawyers with three or more prior experiences in only 48 out of 208 cases (23%) and had "one time" litigators in 100 cases, almost half of the cases in which grantees were represented by a lawyer.

Table 4G: NUMBER OF CASES PER LAWYER

Frequency	No. U.S. Lawyers	No. Grantee Lawyers
1 case	38	100
2 cases	18	19
3 cases	11	4
4 cases	6	4
5 cases	3	1
6 cases	2	1
7 cases	1	2
8 cases	1	1
9 cases	2	1
12 cases	1	0
14 cases	1	0
15 cases	1	0

While the grantee community frequently used lawyers with little or no GAB experience, it more often used lawyer teams, though the data here do not distinguish between pro forma signatures and real participation. In 34 cases it used two lawyers to prosecute the appeal, compared with only 13 such instances for the United States. And it used teams of three twelve times, compared to four such instances for its adversary.

In 82 cases grantees chose to litigate pro se--without the benefit of an attorney. Our study of the case files suggested these were cases of relatively small economic value. The data confirm an average pro se value of $307,000, or almost one-fourth of the average value of all cases of $1,169,000. Similarly, the 25 cases in which the United States had no lawyer had a mean value of $159,000, almost one-eighth the universal mean. Typically the pro se case is brought by a non-profit organization litigating an average disallowance of $86,000.

The drafting, discussing, and finalizing of written decisions is an important part of the Board's work. Half of the Board's cases run full-cycle, meaning the Board must adjudicate entitlement to the appealed dollars. Between 1973 and 1985 the Board issued 714 written opinions in mimeographed form [170], almost a three foot stack.

V. THE PACE OF LITIGATION

A. OVERALL RECORD

We have segregated data into two clusters: 1) cases which have completed the entire litigation process at GAB, called "full-cycle" cases; and 2) cases which have ended prior to the Board's reaching the merits, called "summary" adjudications. For both, their "disposition time" starts on the day GAB stamps "received" on the notice of appeal [171]. Full-cycle cases end with the date of issuance of a written Board decision on the merits. Summary cases end with an earlier closing of the file for one of various reasons: dismissal for lack of Board jurisdiction or for non-prosecution; withdrawal of the appeal with or without prejudice; or settlement. Our sample happened to divide exactly into two: 137 full-cycle cases and 137 summary dispositions.

Disposition time for full-cycle cases at GAB averaged 198 days (6.6 months) with a 179 day median (6.0 months). The average time for summary dispositions was 108 days (3.6 months), with a median of 77 days (2.6 months). For all cases on the docket, the average disposition time was 153 days, or five months.

Table 5A presents disposition times for all cases by quarter-years.

TABLE 5A: DISPOSITION TIME BY QUARTER-YEARS

	No.Full-Cycle	No. Summary	Total	%
0-3 mos.	21	73	94	35.9%
4-6 mos.	45	37	82	31.3%
7-9 mos.	39	12	51	19.5%
10-12 mos.	13	6	19	6.9%
> 12 mos.	13	3	16	6.1%
	131	131	262	99.7%

Several conclusions can be derived from Table 5A. First, we see that the Board clears from its docket a remarkable two-thirds of the filed cases (n.176) within six months of filing, 38% of these (n.66) by a full-cycle adjudication. Second, only 13% of the entire docket lingers more than nine months. Some of these "older" cases were stayed pending settlement discussions or resolution of key issues in parallel cases [172].Third, the typical full-cycle case is on the docket sometime between four and nine months, while the life span of the typical summary adjudication is six months or less.

In federal district court in 1982, 1983, and 1984, the median disposition time for non-jury trials was 13 months [173], meaning that full-cycle GAB cases (median 6.0 months) are resolved more than twice as quickly. The federal disposition data measures from time of "issue"-- the last answer or response-- through trial. Joining issue in federal court takes at least two months [174], so the GAB full-cycle case is resolved at least 2.5 times faster than a federal court case: six versus fifteen months. Comparing the whole docket of each system, the gap narrows between U.S. district court and GAB to two months, seven versus five.[175] The reason is that the great bulk of cases in federal district court, 95%, terminate before trial, while only half of GAB cases do so.

Comparison between GAB and state court produces even more dramatic contrasts. The middle case at GAB is off the docket in 153 days, compared to 811 days for the median tort case in Boston, 788 days in Detroit, 654 days in Newark, 594 days in Houston, 583 days in Pittsburgh, and 574 days in San Diego [176]. Even "fast court" cities like New Orleans, Fort Lauderdale, and Phoenix are twice as slow as GAB [177]. Similar comparisons can be made for disposition time of cases of all types. GAB is six times as fast as Bronx County, five times as fast as Philadelphia and Minneapolis, and three times as fast as Seattle and St. Paul [178]. In Los Angeles Superior Court it takes 41.5 months to reach trial [179], while at GAB an appellant in 6.6 months has reached trial, has been tried, and has received a final written decision accompanied by an opinion.

B. PACE, PROCESS AND OTHER CORRELATIONS

In section IV-C, _supra,_ we discussed the "procedural tracks" instituted at GAB to differentiate cases, for processing purposes, by amount in controversy and by degree of issue difficulty. The five tracks are, in increasing order of complexity: special expedited; expedited; written submission; conference; and hearing. Because each more complex process involves greater opportunities to be heard to the parties as well as more time to prepare, one would naturally expect processing time to correlate directly with the type process employed. Our data confirm this expectation:

TABLE 5B: DISPOSITION TIME BY TYPE PROCESS (FULL-CYCLE CASES)

Process	Mean Days	No. Cases
special expedited	151	5
expedited	155	8
written submission	201	40
conference/hearing	241	62

The Board has set goals of three months for expedited cases, six months for cases on a written submission, and nine months for cases involving a hearing [180]. Looking at the averages in Table 4B we might think the Board is lagging behind its goals in the first two categories. But the Board starts counting days from the "first submission after the notice of appeal."[181]. On the average of all cases it takes appellants 80 days (median 56 days) to submit their briefs and appeal files after the appeal is received [182]. Roughly speaking, therefore, the Board is close to target on its time goals.

We thought other factors besides the "track" used might impact upon disposition time. Obviously stays and time extensions have a direct effect, and these are studied separately below. In addition, the dollar value of cases might correlate positively, on the theory that GAB and the parties would invest time and energy in direct proportion to the dollar sums at stake. In general, this correlation proved out as demonstrated in Table 5C below.

TABLE 5C: DISPOSITION TIME OF FULL-CYCLE CASES BY DOLLAR VALUE

Dollar Values (000)	Mean Days	No. Cases
0-25	169	25
25-100	209	26
100-500	180	28
500-1000	211	19
1000-10,000	216	29
10,000+	237	4
All	198	131

We wondered whether who the appellant was might impact upon case disposition time, thinking, for example, that a major state agency with many Board cases might have a "bagful of tricks" which would delay proceedings. We were pleasantly surprised to learn that, with one exception, veteran litigators take less time at the Board than others.

TABLE 5D: DISPOSITION TIME OF FULL CYCLE CASES BY PARTICULAR STATE AGENCIES

Agency	Mean Days	No. Cases	Days Below Average (198)
Illinois Dep't Public Aid	296	8	-98
N.J. Dep't Human Services	118	10	80
N.Y. State Dep't Social Services	168	14	30
Ohio Dep't Public Welfare	162	9	36
Pa. Dep't Public Welfare	108	8	90

Interestingly, we found that nonprofit organizations averaged 212 days in the 20 full cycle cases appearing in our sample with nonprofits as appellant. While the statistics are too few to be more than suggestive, it may be that experience in litigating at the Board produces greater efficiencies in that appellants learn to move their cases quickly through the process, being fully cognizant of the Board's determination to move cases along as expeditiously as possible.

It appears that the Member who presides may have an important influence on case disposition time. Member "A" seems to shepherd cases through almost twice as fast as Member "E". The breakdown for 130 full cycle cases is:

TABLE 5E: DISPOSITION TIME OF FULL CYCLE CASES BY PRESIDING MEMBER

Presiding Member	Mean	No. Cases
Member "A"	147	42
Member "B"	178	26
Member "C"	202	11
Member "D"	223	22
Member "E"	264	29

Because the Board has "action forcing" procedures, meaning constant next steps with deadlines, as well as personnel management procedures which pressure Members to meet such deadlines [183], we must ask how disposition times can vary significantly from Member to Member.

We should first explore the factors which may make one full-cycle case take significantly more time to resolve than another. The type of process utilized is one factor, of course. Table 5B, _supra_, shows that cases with conferences and hearings require almost 40 more days than cases submitted on briefs and almost 100 more days than cases on an expedited track. Also involved is the "litigiousness" of the attorneys: some litigators are infamous for the barrage of motions they file at GAB. As Table 5C, _supra_, demonstrates, this "litigiousness" may be caused by the high dollar stakes involved, there generally being a direct correlation between time of disposition and amounts in controversy. Another factor may be consolidation practice. When a case is linked to a later appeal ("main case"), it typically has a longer processing time because it must await processing of the main case. Stays may be rightly entered in one case but not another, as discussed in Section V-E _infra_. The final significant factor is a case's special need for extra attention. The GAB procedures have enough flexibility to permit the process needed to decide a case correctly. If more facts or more law or more issues or more analysis is needed, the Presiding Member can always issue more questions, convoke more conferences, and order more briefs. Such flexibility, however, is constantly colliding with the pressure from personnel managers to get cases decided within allotted times.

Is it possible for one Member to be assigned more "extra attention" cases than another? The answer is that such assignments are possible and even probable. The reason is that cases are assigned on the basis of the Members' particular skills and experiences. A Member who has special strengths in the minute examination of factually complex records will be assigned that type of case, while another, strong in legal analysis, will be assigned the tough legal issues. The former will then have cases that are typically slower to bring to decision than the latter. Similarly, the practice of assigning appeals involving issues identical with or similar to those in decided cases to the Member who presided over the earlier appeal will "batch" appeals in ways leading to different disposition times. One batch may involve fast dispositions on legal grounds, while another might require slow, painstaking development of the fact record of each appeal.

Still, even if cases were assigned on a purely random basis, we would expect some variation in processing time among Members. Each factor which leads to different disposition times is controlled to some extent by the Presiding Member. Some Members, for example, may be less willing to grant hearings, stays, and time extensions than others, or may suppress a lawyer's "papering" practices faster than another Member. Some Members will be more resistant to managerial pressure than another. And some Members are more willing than others to pursue factual and legal inquiries not raised by the parties but possibly important to correct resolution.

C. THE PACE OF STEPS IN THE PROCESS

The first step in a GAB appeal is the filing of a notice of appeal within 30 days of "receiving" the Agency's final written decision disallowing costs or taking other adverse action. The Board considers the appeal "filed" on the date of mailing, as established by the postmarked date. It is empowered to dismiss cases for failure to meet the 30 day filing deadline [184] but will excuse late filings for "good cause" [185].

In many cases there is no easy way to ascertain when an appellant "received" an Agency's final written decision sent to it by ordinary mail. Many cases are filed without challenge several days beyond 30 days from the date appearing on the final written decision, presumably because of the time gap between Agency sending and appellant receiving. In our case sample, we encountered 73 cases in which appeals were filed between 32 and 40 days from the date appearing on the final written decision. Most of these were cases where the "excess" is explained by the later receipt date or the fact that the 31st day after receipt was a Saturday, Sunday, or holiday [186]. Still, a significant number of cases, 22, were filed on the 41st day or beyond. Three of the cases in our sample were dismissed for untimely filing, while in several the appellant demonstrated "good cause" after the Board chair issued an order to show cause why the case should not be dismissed as untimely filed. In the balance of cases, it appears that the Agency did not press the issue and the case was settled, or the appeal was voluntarily withdrawn, perhaps because of the jurisdictional problem [187].

In any event, the mean time which elapses between the date of filing and the date of the final written decision is 35 days, and the median is exactly 30 days.

The next step is for the appeal to reach the Board where it is date stamped on the day "received." This takes an average of eight days, with a median of five days. From the date of receipt, the Board promises to take no more than 10 days to acknowledge the appeal, notify the respondent, send a copy of the Board procedures to appellant, and tell appellant what to do next [188]. In most cases, 61% (141/233), the Board does meet this self-imposed deadline. A few acknowledgements (n.12; 5%) take place on the 11th or 12th day, perhaps because the prior day was a weekend or holiday, and some are just outside the deadline by a day or two (29/233; 12%). The number of cases in which the acknowledgement takes 15 or more days is 51, 22% of our case sample. The mean time taken for acknowledgements is 13 days, while the median is 10.

Next comes the briefing schedule and the submission of documents for the appeal file. In the regular process, appellant has 30 days to file a brief and appeal file, the respondent then has 30 days to file its brief and supplemental appeal file, and, finally, appellant may submit a short reply within the next 15 days. Theoretically, then, the briefing schedule in the regular process is 75 days. In expedited cases, there is to be a simultaneously filing of briefs by both sides within 30 days of the acknowledgement.

We found considerable "slippage" in this time schedule, produced mostly by the ready award of time extensions, at least as to a party's initial requests [189]. We found a mean time of 67 days (median 46 days) between acknowledgments and appellants' briefs, a mean time of 52 days (median 41 days) between appellants' and respondents' briefs, and, from then, an average of 30 more days (median 21 days) for replies to be submitted. All together, briefing takes an average of 149 days, with a median of 108 days. The average is almost twice what one would expect from the face of the rules, though the median case is developed only about a month behind schedule.

When briefing is completed, the conference or hearing follows fairly rapidly. In the average case, the time between receipt of the appeal and the conference or hearing on the merits is 165 days, while the middle case gets heard within 153 days.

The step which follows a conference or hearing on the merits is a GAB final decision in the form of a reasoned opinion [190]. 126 different written opinions issued in cases which fell into our sample. In 60 cases the written decision was issued without the benefit of a hearing or conference on the merits, either because the case was in the expedited track or because the parties agreed to a decision based upon the appeal file and their briefs. The balance, 66, contains cases where the GAB three member panel had the benefit of a hearing or conference. Their deliberations and the writing of an opinion consumed an average of 62 days, with the median at 53 days.

We can construct a timetable for the mean and median case at GAB based upon the time spans discussed in the above paragraphs.

TABLE 5F: TIMETABLE FOR MEAN AND MEDIAN GAB CASE

"Average" Case		"Middle" Case	# Cases
Day 1	Final Written Decision	Day 1	274
Day 36	Appeal filed	Day 31	259
Day 44	Appeal received	Day 36	264
Day 57	Acknowledgment	Day 46	233
Day 124	Appellant's Brief & File	Day 92	141
Day 176	Respondent's Brief & File	Day 133	119
Day 206	Appellant's Reply	Day 154	65
Day 209	Conference/hearing	Day 189	82
Day 271	GAB Written Decision	Day 242	66

It turns out that these "average" and "middle" cases take slightly longer when constructed this way than when we simply take the mean (198 days) and median (179 days) disposition times of all full cycle Board cases. We must adjust to start at the same point -- "appeal received"-- by subtracting 43 days in the left-hand column (271-43=228) and 35 days in the right-hand column of Table 5F (242-35=207). These are higher than the "all full cycle cases" calculation because the faster cases submitted on briefs without a hearing or conference are excluded in the latter stages from the cases underlying Table 5F.

D. TIME EXTENSIONS

The Board's practices on granting more time, usually for the filing of briefs, has an important parallel in federal and state court practices concerning trial continuances. Generous continuance policy is often highlighted as a major cause of delay in judicial spheres, both civil and criminal [191], and "tightening up" is regularly a part of reform efforts [192].

The Presiding Member has power to "grant extensions of time for good reasons" [193]. Both grantee and Agency attorneys have not been hesitant to ask for more time, and rarely protest the other side's request [194]. The case files display the usual justifications: onerous workloads; unusual complexity in law or fact; conflicts with trials of other cases; large dollar stakes justifying extra concern; recent assignment to the case; and internal organizational problems.

Based on the data in our case sample, we can confidently conclude that, for the sake of fairness and good briefing, most excuses are deemed by Board members to be acceptable, at least the first time around. We encountered 160 requests for time extensions filed by appellants, of which the Board denied only three. There were 90 such requests from United States attorneys, none of which were denied. Therefore, in the cases in our sample only one per cent of all requests for more time are denied. The Board granted a total of 5,464 extra days for the 246 time extensions we found. The cases in our sample were on the Board's docket a total of 40,084 days, meaning that time extensions prolonged the Board's pace of disposition by 13.6% (5,464/40,084).

Not only does the Board very infrequently deny a party's request for more time, but it also pares them down only slightly -- overall, by one day. This may reflect a lawyer's paring down his requests to reasonable periods after having consulted with the staff attorney or Member beforehand. The next table compares the average time requested by parties to the average time granted by the Board.

TABLE 5G: BOARD ACTION ON REQUESTS FOR TIME EXTENSIONS

Party	No. Requests	Ave. Days Asked	Ave. Days Given
appellant:1st	106	27.2	25.8
appellant:2d	46	26.0	22.8
appellant:3d	8	16.4	16.3
respondent:1st	65	21.1	19.5
respondent:2d	19	17.9	16.4
respondent:3d	6	13.7	12.4
total	250	22.9	21.9

E. STAYS

A "stay" is the suspension of the case, usually pending some important event like the outcome of settlement discussions or the resolution of key issues in a parallel case [195]. The stay is not for the benefit of the parties, as is a time extension, but for the benefit of the process because energy may be saved by case settlement or resolution of dispositive issues. The difference is reflected in the fact that most stays in our case sample were imposed by the Board itself or were requested jointly by the parties.

In our case sample, 34 stays were imposed. Total days stayed were 1,654, for an average of 44 days per stay. Combining stays and time extensions , we see that of 40,084 days our sample cases were on the GAB docket, 7,118 (17.8%) were "stayed" or "extended" days.

For a Board that prides itself on speed of disposition, these "stayed" days should not be counted as the Board's processing time. The Board's current policy is to dismiss such cases without prejudice to their reinstatement should negotiations break down. This may lead to the reverse "counting" problem: a single case being treated as two when it comes back with a new docket number.

F. JOINT CONSIDERATION

In the same way that courts can jointly consider cases involving common questions of law or fact [196], the Board has developed a practice of "joint consideration" of cases involving identical questions. This procedure is particularly important in the field of federal financial assistance for two reasons. First, fiscal disallowances are typically taken only for a discrete accounting period, for example, a particular fiscal year or a particular quarter-year. The grantee may have engaged in the questioned practice for a number of years or quarters, and separate disallowances will be entered for each of these. Although identical legal and factual issues are involved, the disallowed dollars are different and the Board requires separate, timely appeals of each such disallowance [197]. Obvious economies will accrue by consolidating such appeals and+having single briefs and hearings for all. Secondly, a number of states may engage in a practice which the Agency judges violates the terms of a particular grant program. Typically, a series of disallowances will issue against different states. While dollars, parties, and assistance agreements are technically different, the legal standards emanating from grant statute and implementing regulations will be the same, and each state's practices identical or similar enough to be legally indistinguishable. These cases too offer opportunities for procedural efficiencies by means of joint consideration.

To our sample of 274 cases were added 41 "consolidated" cases [198]. The total value of these cases, measured by dollars appealed, was $116,840,000 [199]. What this means is that the 40,084 litigation days consumed by the 274 cases in our sample served to resolve disputes over not only the $313,195,000 appealed in the main cases, but also the $116,840,000 appealed in the consolidated cases, for a total of $430,035,000. Main and consolidated cases numbered 315 in our sample, for an average case value of $1,391,699. The median for the 41 jointly considered cases was $386,000, and median for the 274 main cases was $125,500.

Eighteen of the cases in our sample had additional ones consolidated with them. Usually the groupings were small, mostly pairs and several triplets. But major consolidations occurred twice: one joined twelve distinct appeals and another "mega" case jointly considered sixteen. The consolidations were made pursuant to Board directives. We encountered such an order in each sample case file where a joint consideration had occurred. We asked the attorneys who had been subjected to such a joint consideration Board directive whether they approved of the practice. 49 lawyers answered that they had litigated a consolidated case, and these gave the practice a hearty 4 points on a scale of 1 to 5 (median 4.1), voting as follows:

TABLE 5H: ATTORNEY OPINIONS ON JOINT CONSIDERATION PRACTICE

Opinion	No.
strongly approve	16
approve	22
neutral	8
disapprove	1
strongly disapprove	2

VI. CASE MANAGEMENT AT THE BOARD

A. INTRODUCTION

In the preceding section we displayed some remarkable data about the rapid processing of large dollar cases at the Grant Appeals Board. From beginning to end it takes the Board 198 days to adjudicate fully, including a detailed opinion, a case worth $1,169,000. In Section VIII we will learn that the lawyers practicing at such a fast track court heartily approve of GAB's litigation system. This holds true for grantee lawyers even though they lose, as a group, 80% of their appeals. In this section we will describe the management techniques used by Board Members to process grant appeals.

We hope, of course, that our readers will draw the conclusion that the Board's speed of disposition is a result of these management practices. We cannot guarantee such a cause and effect relationship because our study is not a controlled experiment. It is possible that the same cases and parties would race as quickly and efficiently through federal district court, with its quite different procedure and practice. Common sense, however, makes us believe such a possibility is remote. Each of the management techniques described below is, on its face, quite likely to produce a faster, more efficient disposition than alternatives. The first one, for example, is the practice of trying cases with common issues together rather than separately. Logic tells us that when the same input produces two outputs rather than one, we have achieved greater efficiency and have conserved resources which can now be invested in securing other outputs. Similar straightforward logic produces a like conclusion for each of the Board's other management practices: they will more efficiently and more quickly produce an adjudication than the alternative.

By "alternative" we mean the traditional litigation mode. For each listed practice there is an implicit comparison with the traditional alternative. The old way of litigating includes the following practices. The case is litigated individually, despite the existence of common factual or legal issues with other lawsuits. The representatives of the parties are allowed to create the issues to be litigated and also to manage the presentation of proofs, relatively free of judicial intervention. Fact lacuna, poor briefs, and missing documents and witnesses are tolerated as party litigation choices, for better or worse. Little guidance comes from the bench about unacceptable litigation behavior, continuances are liberally granted, and parties are allowed to forgive each other their mutual failures to meet assorted deadlines. The judge may press settlement, depending on the state of his calendar, but does not ordinarily pressure parties to make partial concesssions on unreasonable factual or legal stances. And the judge's convenience would most certainly determine trial dates, continuances, resolution of motions, conferences, and so forth.

We are not asserting that the case management techniques used by GAB are the "best" techniques, either individually or collectively. The quality of each device, possible improvements, and alternative techniques would make excellent subjects for another study but are beyond the scope of ours, which is simply descriptive and empirical.

Similarly, we do not claim that the "traditional" litigation style described above exists in all courtrooms and administrative boards. Many modern management techniques have been inserted in many chambers in response to the ever-increasing demand for court efficiency. Still, the "old ways" persist in whole or part in many adjudicatory systems. We know this from the studies cited in Section II and our own recent experiences.

B. REVIEW OF BOARD MANAGEMENT TECHNIQUES

Besides standard case management methods, such as written procedures, deadlines, and sanctions, GAB Members actively issue management orders to the parties so as to move cases along efficiently and to insure that the factual record and applicable law are fully developed. Several of these management orders embody proctices that are infrequently found in other judicial or administrative courts, while some, like "show cause" orders, are standard fare. Where we believe the Board is quite untypical is in its intensive and systematic use of the devices described herein. In this section we outline the management practices, provide illustrations, and quantify the use of each.

1. Joint Consideration (Consolidation).

We saw in Section V-F that the Board has achieved significant economies of scale by considering jointly appeals which have common questions of law or fact. When cases are piggy-backed on top of each other, a single set of briefs and a single hearing serve for all, and just one decision is needed to clear all cases from the docket. The Board has particularly inviting consolidation opportunities because of the nature of federal grant disallowances. Although the state agency may have engaged in the challenged practice for a considerable time, disallowances are taken on a quarterly basis. This leads to several appeals involving different disallowances but the same fact pattern and identical issues. Similarly, several states may receive the same type of disallowance, making advisable consolidation of several appeals by different states.

An example will illustrate the practice. The appeal of the Massachusetts Department of Public Welfare in Docket No. 83-246 was from a disallowance of $6.8 million in medicaid reimbursement. The Agency, HCFA, asserted that Massachusetts had failed to file its reimbursement claim within one year of the fiscal year in which the expenditure occurred, in violation of the medicaid statute and regulations. After studying the notice of appeal, the Presiding Member said in the acknowledgement notice he sent to the parties that Massachusetts had appealed similar disallowances in Dockets 83-244 and 83-245 and that all three appeals involved the same time limit issue. He then consolidated the cases with the following order:

> Unless there is an objection by either party, the Board will proceed to consider the cases jointly. This means that the cases will follow the same briefing schedule, that the parties' briefs should address all three cases, and that one appeal file should be developed for all three cases. Issues which are unique to a particular case should be addressed separately within the same brief. Joint consideration of these cases should expedite their consideration by the Board. At the conclusion of the proceedings, the Board will issue a single decision dealing with all three cases.

Cases can be partially consolidated. For example, the statute of limitations question discussed above produced joint consideration of 13 appeals filed by eight different states, all of which had suffered medicaid disallowances taken by HFCA on the ground of untimely filing of reimbursement claims. On April 4, 1984, a Member issued a letter entitled "Proposed Joint Consideration of Appeals." This responded to a motion from the Louisiana Department of Health and Human Services requesting such consolidation. He gave each affected state five days from the receipt of his letter to file objections to his consolidation. On April 27th, he issued an "Order for Joint Consideration of Appeals." This order limited the consolidation to the common legal question which the Member, not the parties, phrased as follows: "That question is whether any provisions of Pub.L. 97-276, 96-272, 97-92, 96-276, 97-51, 97-16, or 45 CFR Part 95 preclude the Agency from paying the various State claims for [federal financial participation] because of the time limits applicable to filing of the claims." While there would be joint consideration of the common legal question, the factual development and discussion of individual legal issues present in each appeal would proceed separately. Therefore, the Member issued stay orders only in those appeals where the time limit question was the only remaining issue.

To eighteen of the cases in our sample were joined 41 additional appeals. We registered 27 different orders necessary to accomplish these consolidations.

2. Procedural Directions.

When a particular event in a case is not regulated by the Board rules in Appendix A, or when details are missing, the Board will issue procedural directions to the parties under its general powers to control proceedings [200]. For example, the procedures for joint consideration of appeals are mostly improvised on an ad hoc basis. In the major consolidation discussed above, the Member established a special briefing schedule and allowed the eight appellants to respond to the one HCFA brief either jointly or individually. Later, he established a conference with an agenda and an order of presentations. He stated the purpose of the conference to be "to discuss the arguments made in the briefs, as well as whether [certain exceptions] carry over into the other statutes setting time limits for filing claims."

In another case a Member warned an appellant who had submitted a document improperly. The Member cited GAB rules which require an original and two copies to the Board, a certificate that a copy has been sent to the other side , and a reference to the appeal's docket number [201]. While the Member accepted the letter, he instructed the appellant to make all future submissions in accordance with the rules.

In the 274 cases comprising our sample, we encountered 66 separate instances of the Presiding Member creating special procedures and issuing appropriate instructions to the parties.

3. Questions to Clarify Party's Position.

If a party makes a statement in a notice of appeal or brief which the Presiding Member does not understand, or doubts, or wonders about its basis, he or she is likely to require the party to expand upon its position. The party's stance may be of a legal nature. An illustration is a case where a Member instructed appellant to "[p]lease explain the State's position" concerning the holding of a particular federal court precedent. The state had asserted a favorable reading of the precedent in its notice of appeal, and the Member inserted the clarification order in the acknowledgement of the appeal. Sometimes the question may seek a factual clarification or an explanation of the meaning of a document. In the acknowledgement of an appeal, one Member asked: "Is it the State's position that, under 45 CFR 95.13(d), expenditures . . . were not made until May 15, 1981? (Notice of Appeal, p. 3) Please explain."

The questioning technique is one of the most popular management tools of the Board. We counted 85 instances in which questions were issued requiring parties to expand upon their factual and legal statements and positions or to clarify ambiguities in documents.

4. Order to Develop Record.

Similar to the above is the Board requirement that a party submit certain factual or legal information, often issued as a formal "Order to Develop Record." Sometimes the Agency will be asked to clarify its practices. In one case the Agency was asked to explain how it determines which congressional appropriation to use to pay a particular claim for federal financial participation. In several cases the Board asked the Agency to state its legal basis for the disallowance.

In the case files we encountered 94 instances in which orders to develop the record were entered and 68 instances when particular fact-seeking or law-seeking questions were posed to the parties. In the former category we placed the frequently used order to submit certain documentation missing from the appeal file.

5. Written Questions for Conference or Hearing.

The questions discussed in paragraphs 3 and 4 above frequently form the agenda for a GAB conference or hearing on the merits. Unlike state and federal court where the parties typically determine and formulate the issues to be litigated and also determine what evidence and argument to direct to these issues, a normal case at GAB is managed by the Presiding Member as to issues, proof, and argument. Having ascertained the factual and legal ambiguities in each side's case by careful study of the briefs and documentation submitted, the Member will ordinarily structure the conference or hearing as a forum for addressing these ambiguities. Each side will be asked to respond to a series of questions, with rebuttal time available for reactions to the other side's presentation.

In the case files we encountered 25 sets of written questions as the agenda for a conference or hearing. This technique, plus the preceding two, reveal the tremendous extent to which a Presiding Member at GAB takes charge of an appeal and orchestrates argument and proof.

6. Issue Formation.

Sometimes in acknowledging the notice of appeal and sometimes in the letter setting the procedure for a conference or hearing the Presiding Member will formulate the issues being litigated. In most cases issue formulation is a not a matter of serious dispute. The final written decision of the Agency must state the legal and factual basis for the fiscal disallowance and, by this time, the parties will have been negotiating long enough to have agreed upon the issues. Nonetheless, we found the Presiding Member stating the issues in dispute sixteen times, and, in ten more cases, asking the parties to clarify them.

Observe how different this is from typical federal and state civil practice where elaborate efforts are made in pleadings, motions, briefs and pre-trial conferences to formulate the exact questions for litigation and to carve away claims and defenses that lack substantial support in fact or law. Deciding what to decide is frequently a major determinant of civil court delay and cost.

Lawyers practicing at GAB are quite content with the issue formulation of the Members. When asked their opinion of "issue clarity" in their last litigated case, 55% of the respondents answered "very good" and 39% answered "good" [202]. This high opinion was held by both U.S. and grantee attorneys [203] and regardless of case result [204].

7. Warnings.

In common with federal and state judges, Members often issue warnings to the parties about possible sanctions or adverse actions which may be levied in response to certain party behavior. We have seen that Presiding Members rarely deny time extensions [205]. It may well be that few denials are registered because the Board makes explicit, by warning, when the parties should stop asking. In one case, by way of illustration, a Member conceded a Massachusetts lawyer one more month to file the appellant's brief and appeal file. The lawyer had pleaded some of the usual excuses: recent assignment to the case; reorganization of his legal department; difficult legal issues; and large dollar stakes. While approving the motion, the Member warned: "Although your request for an extension is granted, please be advised that no further extensions will be granted absent extraordinary circumstances." Similarly, another Member gave a two-month extension to a lawyer with impending federal court trials but advised: "The appellant should note, however, that the Board does not usually grant extensions of such length as the one requested here. The Board will not be inclined to grant any further extensions without a showing of extreme hardship." And in Docket No. 83-272, a Member advised the Chicago Department of Human Services that, having given it five extra months to present certain documentation, his patience was coming to an end.

Warnings of impending disciplinary sanctions are also frequent. In more than one case, a party who was neglecting to certify that he had sent copies to the other side was told that the next failure would result in the exclusion of his offered proof from the record.

In the case files we counted 18 such warnings.

8. Orders to Show Cause.

A popular management device at the Board is the "order to show cause" (or its close kin the "order to respond to tentative findings") 55 of which were found in the case files. This is a "last gasp" opportunity for a party to convince the Board not to take some adverse action, many times being an adverse decision on the merits issued in "draft" form. The Board will lay out the findings of fact and legal analysis underlying its proposed decision and ask the "about to lose" party why the Board should not finalize its action. In one case the Ohio Department of Human Services submitted "Comments on Draft Decision" which convinced the Board to withdraw its tentative decision and reverse a $1.25 million disallowance [206].

Show cause orders are also used for various sanctions. A typical illustration is when a Member issued an order for the appellant to show cause why the appeal should not be dismissed for being untimely by one month. In his proposed order the Member rejected as "insufficient justification of the substantial delay here" the change of management excuse previously offered by the new executive director of the nonprofit appellant [207]. In another case, a different Member "tentatively conclude[d]" that the Board should dismiss an appeal because the "time has passed for the City to present more documentation" of its claim. He gave the City a final 21 days to show cause why the City's appeal should not be dismissed.

9. Seeking Party Concessions.

An order to show cause is an imposed decision. Different in kind is an effort to seek a factual or legal concession from a party because of the element of agreement. Much of what judges do at pre-trial conferences is to promote party agreement on issues, facts, and documents. This strategy enables the areas of true dispute to be narrowed, thereby augmenting litigation efficiency. It is an essential tool in all judicial kits.

According to one Member, promoting party agreement is "the kind of thing the Board is good at." [207] He sent us copies of correspondence between the Illinois Department of Public Aid and DHHS's Office of Human Development Services in which the latter withdrew $4.2 million of a $16 million disallowance because of "facts that emerged at and subsequent to the hearing before the GAB." In turn , the state withdrew its appeal of the balance of the disallowance. The Member summarized the bargaining process in the following words:

> [The appeal] involved a long process before us (unfortunately) including a hearing, and a good many months of "stayed" status while OHDS mulled it over. The state conceded a big portion of the disallowance originally based on Board precedent. Then, after a long while and further development, the Board presented an extensive list of questions to OHDS which challenged OHDS to justify certain positions or face loss. In response to those questions, OHDS chose to withdraw the remaining disallowance. . . . Thus, I like to think the Board led the two adversary parties to decisions which they can justify to themselves, without our resolution in the form of a decision. [209]

In our sampled cases we found ten specific instances of the

Presiding Member pressuring a party towards a concession. In one case, a Member summarized a phone conversation as follows: "The Agency, however, was persuaded to agree to examine further documentation submitted within the next 45 days, after I cited the success in reducing the disallowance in [Docket No.] 82-130 and the problems the City noted in gathering the documentation." Presumably, the Agency could have taken the position that the grantee's documentation should have been offered during the audit negotiations and not belatedly before the Board, though the Board regularly allows post-audit submissions.

Concessions are often of a procedural nature. One example is when a party requests a fact hearing but withdraws the request when convinced by the Presiding Member that a hearing is not really necessary.

10. Special Briefs.

If the Board wishes special input from the parties on difficult questions of statutory interpretation or the like, it may issue an "invitation to brief." This is particularly helpful to the Board when an important question of law affects several appeals and the combined research efforts of several parties may insure that no stone is left unturned. We encountered 21 such invitations to brief, many of which were quite comprehensive in detailing the issues and sub-issues to be discussed in the special briefs.

11. Summary Decision.

The "summary decision" was instituted by the Board to make swift decisions on cases with foregone conclusions. Typically, a Board precedent is squarely on point because of the losing appeal of an earlier disallowance involving identical grounds. The appellant knows its new case is also a loser and wishes only to "exhaust" its administrative remedy at the Board as quickly as possible on its way to federal court. The Board is quite willing to accommodate this desire and will summarily enter an adverse decision in a one or two paragraph opinion which cites the governing precedent.

12. Miscellaneous Orders.

The orders discussed in the preceding paragraphs, while being the heart of the Board's case management, do not exhaust the inventory. We also noted orders (n.2) setting a place of hearing outside the District of Columbia, orders (n.2) requiring the attendance of a designated person at a hearing or conference, orders (n.7) splitting appeals into separate dockets, orders (n.11) requiring parties to file status reports, and orders (n.10) that parties identify their witnesses and the substance of their testimony.

In Table 6A below, we rank the management techniques discussed above by frequency of use as discovered in the files of our sampled cases.

TABLE 6A: INVENTORY OF GAB CASE MANAGEMENT TECHNIQUES

	Technique	Times Used
1.	SUBMIT SPECIFIED INFORMATION OR DOCUMENT	94
2.	CLARIFY FACTS, LAW, OR DOCUMENT	85
3.	QUESTIONS SEEKING INFORMATION ABOUT FACTS OR LAW	68
4.	PROCEDURAL DIRECTIONS TO PARTIES	66
5.	SHOW CAUSE ORDERS	55
6.	CONSOLIDATE CASES	27
7.	WRITTEN QUESTIONS FOR CONFERENCE OR HEARING	25
8.	INVITATION TO BRIEF	21
9.	WARNINGS	18
10.	GAB FORMULATES ISSUE	16
11.	SUMMARY DECISION	12
12.	FILE STATUS REPORTS	11
13.	IDENTIFY WITNESSES AND TESTIMONY	10
14.	PARTIES TO CLARIFY ISSUES	10
15.	SPLITTING APPEAL INTO SEPARATE DOCKETS	7
16.	LOCATE HEARING OUTSIDE D.C.	2
17.	REQUIRE SPECIFIED WITNESSES	2
	Total	529

C. ATTORNEYS' VIEWS OF CASE MANAGEMENT

We asked the attorneys who practice at GAB whether the Presiding Member had used "case management" techniques in the attorney's last case at the Board. We defined the quoted phrase as follows:

> Techniques used by Board Members and staff to move cases along efficiently and to achieve correct results. Examples include orders to develop the record, orders that particular information or documents be provided, and GAB formulation of the issues in dispute.

98 respondents replied affirmatively. We asked these whether such management increased the efficiency of the proceeding. 58 said "yes," which is 78% of the total. Ten said "no" (10%) and the balance (n.12; 12%) did not know. All together, then, lawyers who "know" believe at a six-to-one ratio that court management improves efficiency, which we defined for them as "[r]eaching and deciding an issue with minimum investment of time and resources."

Almost the same six-to-one ratio approves of case management in general. Table 6B summarizes the answers to this questionnaire probe.

TABLE 6B: LAWYERS' OPINION OF CASE MANAGEMENT

Opinion	No.	%
STRONGLY APPROVE	15	12
APPROVE	66	53
NEUTRAL	29	23
DISAPPROVE	13	11
STRONGLY DISAPPROVE	1	1

The significant percentage of attorneys who were "neutral" worries us in that court efficiency should be a concern of every member of the legal profession. We also observe that the 12% figure for "strongly approve" is considerably below the 36% rate at which respondents gave the best rating over all our questions [210].

It is interesting to observe that while attorneys approve of case management both in general and in its specific application, they are considerably less sure that such management improves the quality of the final decision in a case. Less than half of the respondents thought that the case management practiced in their case "help[ed] achieve a correct result on the merits." The others thought it did not (n.22; 23%) or they did not know (n.29; 30%).

VII. BOARD EFFECTIVENESS

How well does the Board produce its desired effects? As an adjudicatory body, the Board's overt goal is to produce "correct" adjudications, meaning the combination of: 1) accurate fact-finding; 2) appropriate selection of legal norms; 3) sound understanding of the content and meaning of those norms; and 4) precise syllogistic application of facts to law. Stated thus, "effectiveness" immediately shows its elusive character.

Having had a considerable prior experience in analyzing grant law in general and Board decisions in particular [211], we considered making personal judgments about the correctness of Board adjudications. For example, we have incorporated some 500 Board decisions into our three-volume treatise and, in the process, gained the impression that the Board correctly selected, understood, and applied the grant norms governing the disputes before it in a high percentage of cases. Still, this evaluation, even if sound, is only partially informed. We had no workable way of ascertaining whether the "facts" narrated in Board opinions coincided with reality in terms either of accuracy or completeness. Nor could we feasibly ascertain whether all relevant law was considered. Further, the softness of most legal norms, even those in the arrid field of grants-in-aid, means that more than one and, many times, contradictory interpretations may be reasonable. Board opinions present and defend just one view, the one leading to the Board's result. We lacked, therefore, the other reasonable readings and applications which might cast doubt upon the validity of the Board's decision. As a consequence, like other researchers [212], we did not assay an independent judgment about how "just" or "correct" the Board's decisions are.

Instead of offering our personal judgments, we turned to the composite views of the attorneys who practice at the Board and to the federal courts which review its decisions. Even these sources are flawed: the former by the partiality infusing the adversary system, the latter by the narrow scope of judicial review of administrative action [213].

Before turning to the views of lawyers and federal judges, we will examine the Board's ability to promote settlements by negotiation or mediation. Agreed upon resolutions are not necessarily "correct" resolutions in that a party with a strong case on law and facts may have inappropriately bargained away his "lawful" dollars. But such is an overly academic view of civil adjudication. The bottom line is not abstractions but party satisfactions. If the disputants walk out of court pleased with the result, no one need look behind the settlement. For this reason, courts which promote (without forcing) settlements are generally considered effective. A division of disputed dollars which satisfies all parties is per se a "correct" resolution.

In 1981 the Board hoped to improve settlement rates by offering parties the services of trained mediators [214]. Each acknowledgement of appeal contains a standard passage stating:

> Although the appeal is now pending, the parties may negotiate to resolve the dispute informally. The Board will assist in any way appropriate, and can provide mediation services. See $16.18.

In the 274 cases comprising our case sample, the Board's mediation offer was accepted only four times, three in 1982 appeals and the fourth in 1983. Two of the four led to mediated resolutions of small amounts. The other two failed in mediation and came back into the adjudication process. Thus, less than one percent (.7%) of the Board's cases are resolved by mediation. In an interview, the Board Chair believed that a higher percentage of mediations was occurring recently, and he expressed continued interest in promoting the process.[215]

We considered the attorneys' rejection of mediation to be so absolute that probing in the questionnaire for their motivations was not justified. Based upon our experience, we offer several explanations. First is the general lack of familiarity with mediation in the profession [216]. Second, government lawyers sometimes perceive settlement to be an inappropriate disposition of public funds to which their agency is "entitled."[217] We shall see that even negotiated settlements at the Board are infrequent, which corroborates this thesis. Third, almost all attorneys practicing at the Board are salaried employees of government or quasi-public agencies. This means that the strong economic pressure on attorneys and parties which forces most civil litigation to settle is absent, though large caseloads in some instances may push in that direction. Fourth is the status of cases at the point they reach the Board. The Agency's final written disallowance will normally issue only after a lengthy series of negotiations beginning with the audit process. The cases which reach the Board may be those where the parties are "talked out," the lines of disagreement being clearly etched by then. When they appeal to the Board, further negotiation may seem senseless to the parties, even when the extra ingredient of a mediator is offered. Fifth, public officials may, for political reasons, prefer to have a decision imposed by the Board rather than being accused of abandoning a claim. Finally, the process of getting a settlement approved by superior officials may be more complicated and difficult than pursuing the Board appeal to completion.

After rejecting mediation, parties may still engage in direct settlement negotiations, a process which the Board encourages [218]. Sixty cases in our sample, 22% of the total, were fully settled. This compares to federal district court where 47.1% of filed civil cases terminate with no judicial action whatsoever and where all but 5% of the balance terminate without reaching trial.[219] . The total dollars settled at GAB, which includes both full and partial settlements [220], amounts to $64,174,000, or 20% of the total amounts appealed.

We suspect that the low settlement rate may reflect the pre-appeal breakdown of negotiations which led, in the first place, to the final Agency disallowance and the appeal to the Board. It may also reflect the weakness of many grantee appeals. Grantees lose 83 percent of dollars appealed to the Board and adjudicated by it and 82 percent of all disallowances [218]. Grantees of course perceive that many of these Board decisions were incorrect -- one-quarter of the grantee attorneys thought their loss was "unfair" or "very unfair."[222].Still, most U.S. attorneys believed the contrary --that the final outcome in their case was "very fair" (42%) or "fair" (54%) [223] --and it is the perception of the strength of one's case which determines settlement possibilities. Because U.S. attorneys are repeat litigators at the Board [224], they know of their high success rate, which can only solidify anti-settlement attitudes. In summary, whether or not the grantees bring weak appeals, and the data suggest this to be the case, the U.S. attorneys certainly perceive maximum chances to win an adjudication and, consequently, are not eager to settle.

We asked the lawyers "Overall, to what extent do you feel that the final outcome of the case was fair to all involved?" and let them answer "very fair," "fair," "unfair," or "very unfair."[225]. This was our "effectiveness" question, though we substituted the more familiar concept of fairness. The next Table 7A organizes the overall results [226].

TABLE 7A: ATTORNEY VIEWS ON BOARD EFFECTIVENESS

	No.	%
VERY FAIR CASE RESULT	31	24%
FAIR CASE RESULT	64	50%
UNFAIR CASE RESULT	27	21%
VERY UNFAIR CASE RESULT	5	4%

While most attorneys thought their case was correctly or fairly decided, a sizeable block, one-quarter, was dissatisfied. The next table ascertains whether the attorneys' success or failure in the case litigated colors their views as to Board effectiveness.

TABLE 7B: ATTORNEY VIEWS ON BOARD EFFECTIVESS BY CASE RESULT[227]

	Winner		Loser	
	No.	%	No.	%
VERY FAIR CASE RESULT	21	43%	2	6%
FAIR CASE RESULT	26	53%	18	50%
UNFAIR CASE RESULT	2	4%	13	36%
VERY UNFAIR CASE RESULT	0	0%	3	8%

The results in Table 7B are not surprising. Case winners rarely believed their victories to be unfair, while losers thought at a 44% rate that their defeats were undeserved. In the adversary system it is natural for attorneys to become convinced, along the way, of the justice of their cause. However, it is surprising to note that 56% of the losers admitted the fairness of a loss. This may corroborate the theory of some Agency attorneys, one which our experience leads us to share, that grantee appeals are often very weak on law and fact. This theory would also explain why so few winners were willing to characterize their victories as unjustified, especially after having received a thorough, convincingly reasoned Board opinion.

The next table analyzes attorney views by party represented. This is, essentially, a rehash of Table 7B because Agency attorneys win such a high percentage of cases at the Board. In other words, the group of "winners" is comprised mostly of Agency attorneys, and grantee legal representatives make up the bulk of those reporting losses.

TABLE 7C: ATTORNEY VIEWS ON BOARD EFFECTIVENESS BY PARTY REPRESENTED [228]

	U.S.		Ge	
	No.	%	No.	%
VERY FAIR CASE RESULT	21	42%	10	13%
FAIR CASE RESULT	27	54%	37	49%
UNFAIR CASE RESULT	1	2%	25	33%
VERY UNFAIR CASE RESULT	1	2%	4	5%

GAB decisions have been appealed many times to federal court, thereby offering some evidence of the soundness of Board adjudications. One might readily assume that GAB's batting average on appeal would be a reliable indicator of Board effectiveness. This batting average at the time of writing is a hefty .888, a sure MVP pick. GAB has been affirmed 32 times on appeal [229], and reversed or remanded on only four occasions [230].

Yet our bets on this game have to be carefully hedged for many reasons. First, Board decisions which favor the grantee are not appealable into federal court because GAB action is the Secretary's final decision by delegation. This means that neither the Agency nor the grantee is adversely affected by the decision and no party has standing to appeal. As a consequence a number of GAB decisions are effectively insulated from review. Second, federal court review is limited by a narrow standard of review, whether "arbitrary and capricious" or "substantial evidence." This means that grantees have to convince the federal bench that the GAB decision was more than merely wrong. Pushing in the other direction is the third factor, that grantees choose which decisions to appeal and, presumably, invest their scarce resources only in best opportunities. Some fifty GAB decisions have been brought into federal court, only one out of every fifteen, meaning that a substantial winnowing takes place. Three of each fifteen are pro-grantee therefore unappealable results, leaving eleven grantee choices not to appeal. A fourth warning light is the appellate power to affirm a Board decision for reasons other than those articulated below and the advocates' propensity to invent new arguments and tactics on appeal [231]. Our scoring does not attempt the herculean task of determining when the grounds for affirmance advanced by district and appellate judges were arguably or clearly different from the grounds for decision stated by GAB.

Despite all these caveats, we believe the 89% Board win record on appeal strongly corroborates our impression that the Board decides cases not only efficiently but also well. The substantial bulk of federal court opinions adopt the Board's reasoning and would appear to be affirmances regardless of the scope of review. Further, the fact that losing grantees do not appeal eleven of every fifteen GAB decisions corroborates our questionnaire results which show high lawyer satisfaction with GAB both in practice and product. The decision to appeal, to be sure, is composed of many considerations. But the quality of the

Board decision and its supporting opinion are critical factors and a low appeal rate can be read as an affirmation of the soundness of both.

VIII. PERCEPTIONS OF PROCESS

A. ATTORNEY QUESTIONNAIRE

Empirical studies demonstrate that the effectiveness of case management techniques and court improvement initiatives is highly dependent on the cooperation of the bar practicing in the particular court system. One study labeled this the "local legal culture" and showed its strong impact on case processing times [232]. Court procedures aimed at moving cases along expeditiously may or may not succeed in the long run depending upon attitudes of the lawyers and judges subject to them. Where bench and bar believe in the appropriateness of and need for greater efficiency in case processing, procedural steps aimed at that goal will be productive. This is particularly true when attorneys can be made to see that efficiency serves their interests as well as the public's, as when rapid decisions help management run a better program or business. On the other hand, in districts where attorneys and judges believe that lawyers should control the pace and methods of litigation, with minimal judicial interference, efficiency-seeking measures will likely fail. Even if reforms are mandatory, lawyers, in collaboration with like-minded judges, will find ways to evade the new requirements and to continue to litigate in the style traditional to the district.

In light of the determinative influence of lawyer attitudes on the likelihood of success of procedural innovations, we had to ascertain the views of the lawyers practicing before GAB. Their views might provide important insights about the acceptability of GAB "heavy management" techniques to the bar and, consequently, the reception to be expected elsewhere. Lawyers from coast to coast practice before GAB; therefore, our findings would have a "national" flavor as opposed to a "local legal culture." This would enhance our findings, in the sense of making them representative of views likely to be held throughout the country. But it would also factor out the attitudes contrary to those in our sample which might be held in aberrational districts, regions, or agencies.

We sent the questionnaire in Appendix E to 290 attorneys whose names appeared in GAB case files. 131 responses were received from at least 31 different states. See Appendix B. Eighty respondents represented grantees before the Board and fifty represented the United States. We asked the lawyers to answer case-specific questions on the basis of the case they last litigated at GAB. One of our questions was whether they had won, lost, or split this last case. 50 reported victories, 38 defeats, 35 split decisions, and 8 did not respond. Throughout the report we use the phrase "United States attorney" not in a technical sense but meaning the representative of the United States' position. One Board Member objected to our putting the "United States" on the right-hand side of the "v.," saying:

> I object to speaking as thought the U.S. were a party.

> The subagencies of the Department are parties. The process is set up by the Secretary of the Department. If the correct result is achieved, the U.S. "wins," even if the grantee retains the funds.

In summary, our responses reflected a good cross-section of the country, of the parties represented at GAB, and of case results there. Most respondents reported on recent results (1985,80; 1984,33; 1983,15; 1982,2; 1981,1), meaning that their perceptions were reasonably fresh. Of importance is the fact that those who responded had litigated more than 491 cases before the Board [233], almost one-fourth of the entire caseload of the Board over its thirteen year history.

Most of the respondents had moderate legal experience.Two-thirds said they had practiced law between 6 and 15 years. Only 11% (n.14) had 16 or more years in the practice of law, while 22% (n.28) had been lawyers five years or less. On an average they had represented government authorities for eight years; these responses spread over a range from one (n.4) to thirty-one (n.1) years, with most (n.86) in the 2 to 10 year range. Only 25 respondents, 19%, had appeared in just one case at GAB. 45 respondents (35%) had litigated six or more cases, and the average across all respondents was 3.8 cases. 84% said they had participated in a GAB conference or hearing in their last case.

All together, the respondents had considerable experience providing legal representation to government agencies both at GAB and in all regions of the United States. This profile encourages us to believe that the questionnaire answers were likely to reflect both considered and informed judgments.

Our questionnaire sought the following types of information [234]. First, we wanted some idea what these attorneys generally thought about court efficiency and case management -- the heart of this report. Second, we wanted their general impressions about the Board itself : its procedures, personnel, efficiency, and capacity to produce "correct" results. Third, we sought information about particular facets of GAB procedures, such as discovery, use of telephonic conferences, and deadlines. Finally, we scattered several questions aimed at ascertaining whether attorneys thought the Board to be partial, in the sense of being predisposed toward ruling in favor of or against the United States.

B. COMPOSITE VIEWS OF ATTORNEYS [235]

We asked attorneys for their opinion of strong "case management" which we defined as follows:

> Techniques used by Board members and staff to move cases along efficiently and to achieve correct results. Examples include orders to develop the record, orders that particular information or documents be provided, questions to clarify parties' legal and factual positions, and GAB formulation of the issues in dispute.

We assumed that attorneys, used to controlling the pace and procedures of litigation, would be generally antipathetic to heavy management of "their" case. We were pleasantly surprised to learn the contrary: overall, our attorneys approved such interventionism. On the extremes, 15 respondents strongly approved of such management, while only one vehemently disapproved. Toward the center, more than half of the respondents "approved" of court management (n.66), while only 13 respondents, 10.5%, "disapproved." A considerable number of respondents, 29 (23.4%), were "neutral" to the matter. This significant quantity of indifference may signal a worrisome attitude that court efficiency is not a lawyer's concern. In summary, the composite opinion about case management was:

APPROVE	81	65%
NEUTRAL	29	23%
DISAPPROVE	14	11%

This attorneys' predisposition in favor of active case management portended a rosy review of the Board, which is similarly inclined, both in theory and practice.

In fact, the attorneys' evaluation of the Board's efficiency, procedures, and personnel is even more positive than one could anticipate. Recall that grantees win only one of every six dollars and only one of every six disallowances adjudicated by the Board [236]. Since two-thirds of the respondents were grantee attorneys, we might expect a dismal opinion of the Board. But on all counts the Board received high grades.

Concerning the Board's efficiency, defined as "reaching and deciding an issue with minimum investment of time and resources," the lawyers gave the Board top rating ("very good") in 53 responses, 41% of the total. Most of the remainder (n.62; 48%) rated the Board's efficiency as "adequate." The mean and median scores for this rating were 3.3 out of 4.

Such efficiency did not, apparently, curtail the parties' opportunities to prove their cases, the price one might expect highly efficient court systems must pay. [237] From Table 8A, infra, we see that the Board was rated very high in terms of the opportunities it offered the parties to present their cases as to facts (mean: 3.5/4), as to law (mean: 3.5/4), and as to "all of the evidence and arguments favoring your side of the case." (mean:3.3/4).

We used two ways of measuring the attorneys' general opinions about the Board's procedures. We asked attorneys to rate them directly on a scale of 1 to 10. The Board's procedures scored an impressive 7.01, above state court (6.58) and below federal court (7.49). A question for future research is what particular facets of state and federal court practice are considered unattractive and attractive, respectively. A second measure is the composite score on all questions. The respondents gave the Board the top score in 36% of the ratings (856/2379) and a score of "adequate," "fair," "approve," or "infrequent" (something undesirable) in half the cases (1194/2379). Thus, in a remarkable 85% of all evaluations the Board was graded as satisfactory or better. The mean and median score on all questions was 3.2 of 4. [238]

Board personnel received comparable ratings. On a scale of 1 to 10, Board Members were rated at 7.02 and Board staff attorneys at 7.09. When asked directly about the "competence" of the Board Member who presided over their cases, the lawyers gave top grades ("very good") in 60 instances (46%), while rating the judge as inadequate or worse only nine times (7%).The mean score on the "competence" question was a solid 3.38 of 4.

We gave the attorneys an opportunity to tell us about GAB in their own words. 38 respondents volunteered comments. Their tenor coincided with the positive pattern of the scores, whether offered by United States or grantee representatives. The lawyers who were favorably impressed with the Board's operations said:

> "[T]he judge cuts through all the rhetoric and gets down to the issues very quickly." (Respondent #5. U.S. Winner)
>
> "GAB is ... first rate on substance, creativity in procedures, and fairness." (Respondent #18. Ge. Loser)
>
> "What impressed me most about the GAB procedure was the creation of the 'file' whereby we were able to submit all pertinent evidence... ." (Respondent #19. Ge. Loser)
>
> "[T]he best administrative tribunal I've ever worked with in terms of case development. The presiding officials and staff attorneys are particularly good at questioning to develop facts. ... [T]he decisions are very, very thorough." (Respondent #26. U.S. Winner)
>
> "In every respect I have found the Board and its staff to be an outstanding professional body." (Respondent #51. U.S. Splitter)
>
> "[T]he GAB's procedures are fair and expeditious."

> (Respondent #57. U.S. Splitter)

> "I specialize in GAB practice because I like it. It is fast, fair, and no one gets away with sloppy work." (Respondent #63. Ge. Winner).

> "The GAB works well because of the excellent quality of staff ... ." (Respondent #82. Ge. Splitter)

> "I have been uniformly impressed with the Board, particularly as to ... [the] clarity and excellence of the written decisions." (Respondent #92. U.S. Splitter)

> "I am generally impressed with the informal and usually fair way the Board handles individual cases ... ." (Respondent #99. Ge. Winner)

> "I found that body to be very thorough in assessing the facts submitted and in making a ruling on those facts... ." (Respondent #108. Ge. Winner)

> "GAB is a good, fairly quick and less expensive alternative to litigation." (Respondent #122. Ge. Loser)

> "On the whole I have not had any trouble in cases before the GAB. I am satisfied with the procedures." (Respondent #127. U.S. Winner)

Seventeen representatives of the grantee community commented negatively. The most common criticism was that the Board, despite its appearance of neutrality, was at bottom an arm of the United States which strongly favored DHHS actions and interpretations. Strong feelings are evident in the following epithets: "a slick, efficient operation which ends up quickly reviewing and approving most of DHHS' proposed adverse actions;" "a kangaroo court that rubber stamps the wishes of the U.S."; "their role is simply to implement departmental policy and give it a gloss of legality and impartiality"; "[t]he GAB seems to view their function as upholding DHHS disallowances"; "[t]he gross partiality of the GAB for its employer, DHHS, makes it an obscenity in the 'justice' system"; and "[t]hey are clearly fearful of showing any more than the smallest amount of independence from DHHS positions." GAB's adherence to "technical" federal requirements is frequently perceived by the grantee community as antithetical to the "big picture," which is the ultimate goal of the programs: to provide health and welfare services to needy individuals.

On the other side of the "v.", federal attorneys frequently perceived the exact opposite: the Board bending over backwards to help grantees. Five U.S. attorneys complained about the Board's pro-grantee attitude. But there is a subtle difference in the complaints of each side. The U.S. attorneys saw litigation favoritism, such as interjecting issues favorable to the grantee-appellant, making grantees' arguments for them, and liberally conceding them time concessions. In contrast, the grantee attorneys worried more about the Board's uncritical acceptance of federal policies underlying fiscal disallowances --more a question of rulings on the merits. Two U.S. attorneys anticipated this criticism from the grantee group and rejoined that if grantees frequently lost at the Board, this was simply a result of their cases generally being weak on the merits and not any pro-United States bias on the part of the Board.

This perception that GAB is wedded to federal substantive policy, whether realistic or not, seems to be the grantees' main bone of contention. Twenty lawyers bothered to write that GAB's authority should be increased in this regard. The Board should have the power, according to the write-in's, to set aside DHHS policy (whether in the form of regulations, lesser issuances, or "interpretations") as contrary to statute, as arbitrary and capricious, or as procedurally flawed. One senses that these lawyers lost cases at the Board because of an unfavorable DHHS rule which made no sense to them but which the Board honored nonetheless. This also underlies the several comments that GAB should offer "more fairness, less rules," or should correct inequities caused by DHHS actions and policies, or should avoid "technicalities."

Several particular aspects of Board procedure provoked significant discontent. 66 attorneys (52%) were unhappy with the accessibility of GAB precedents which are issued in mimeographed form, mailed only to those who know to ask, and roughly indexed. Thirteen respondents commented that GAB should index, publish, and widely disseminate its opinions. A significant number of grantee attorneys, 28, rated their discovery opportunities as inadequate or very poor. The recommendations for broader discovery powers were the second favorite write-in comment. Many lawyers also mentioned the Board as needing subpoena power, although it was not clear whether they meant subpoenas to compel attendance at a deposition, at a hearing, or both. Significant numbers of attorneys (n.20; 16%) thought Board members did not wisely utilize their discretion and most (n.76; 60%) thought such exercises of discretion were merely adequate. This is not surprising given that acts of discretion, such as granting or withholding time extensions, frequently involve delicate and debatable balances of equity. A final "soft spot" was the Board's reception of redundant evidence, thought to be "frequent" or "very frequent" by 28% of the respondents.

On all other counts -- notices, deadlines, issue clarity, evidence gaps, surprise witnesses, evidentiary rulings, and use of telephone conferences -- the Board scored well.

The discovery issue has plagued the Board for several years. Discovery is not mentioned in the Board rules, but the Board will grant discovery if a litigant can show a strong need. [239] Several lawyers are unhappy about having to make such a showing, preferring to have free access to depositions and interrogatories as in federal and state court. One Member thought these were just a handful of disgruntled lawyers, but data in Table 8A, infra, show it to be a sizeable minority.

Without doubt, should the Board adopt free discovery as in federal court it would invite the delays and abuses which provoked the 1983 amendments to the Federal Rules of Civil Procedure [240]. A change toward free discovery would not bring many compensating benefits, because cases at the Board do not ordinarily involve the type of fact issues for which discovery is most needed [241], and would certainly not be generally required as a due process right under the balancing test of Mathews v. Eldridge [242]. Should the Board decide to offer discovery it probably has the legal wherewithal to do so, though it cannot directly issue subpoenas or contempt orders. It will take negative evidentiary inferences should a party fail to produce a witness or a document as ordered [243], and can take a hint from the Supreme Court and, under its power to control proceedings, impose sanctions against parties who disobey discovery directives [244]. But a serious question remains whether more discovery would be an advisable reform.

The Board should disseminate more widely its opinions and the key word and citation index prepared by its staff. Board decisions are authoritative precedents and for the sake of fairness should be as widely available to the first time litigator as the veteran. While efforts to convince private companies to publish and disseminate Board opinions have foundered on economic reefs, the Board itself could expand and improve its distribution list, as by automatically sending its opinions and their indices to first time litigators.

We were puzzled by a significant aberration in the data: Despite the high scores given by both sides to Board procedures and personnel, a significant percentage of attorneys, one quarter, thought the final outcome in their cases was "unfair" or "very unfair." These were overwhelmingly grantee attorneys: 29 of 31 who thought the outcome unfair. See Table 8B, infra. Good people applying good procedures should normally, one would imagine, produce good results.

We first looked, of course, at the correlation between an attorney's opinion on the fairness of a case's outcome and how well the attorney did in the case: win, lose, or split. See Table 8C, infra. As expected, substantial numbers of losers thought the case result was "very unfair" (n.3; 8%) or "unfair" (n.13; 36%). We were surprised to learn that those who reported split victories also groused about the outcome in almost equal numbers (n.13; 37%). The reason for discontent in those who reported partial wins is likely the quality of the victory. Not infrequently the Board or the Agency will make a minor financial concession to the grantee while preserving the bulk of the fiscal disallowance. Consequently, the grantee can report a "split" result while remaining dissatisfied with the outcome.

It is pleasing to note that a large percentage of those who reported having lost at the Board were able to characterize that result as "fair" (n.18; 50%), though only in two cases did the loser describe the result as "very fair." Curiously, the converse did not happen frequently. No winners thought their victory to be "very unfair" and only two judged their win to be "unfair." This is consistent with the data which show that the United States usually wins and the write-in comments of its attorneys to the effect that grantee appeals are often quite unsound in law and fact.

The puzzle --satisfaction with the Board but dissatisfaction with case results--may have a second, more subtle key. It may be that attorneys from the grantee community believe that the "pro-U.S." bias of the Board, a view often mentioned in the write-in comments, leads to unsound results even though the Board's procedures are generally perceived to be satisfactory and its personnel to be competent. We asked the attorneys whether Board members and staff treated parties impartially. In 28 cases (21%) lawyers reported partiality, 21 viewing the United States as being favored and 7 seeing the grantee as the favorite. A lesser number (n.20; 15%) reported the procedures as being biased [245], most thinking the United States to be the beneficiary of the bias (n.14). Part of the perception of bias may stem from the belief in the grantee community that the United States has superior resources in litigating before the Board. Forty percent of the respondents so believed. On their face the Board procedures offered equal and quite full participatory opportunities --79% of the respondents thought "participatory opportunities" to be equal. Yet superior United States resources and a pro-U.S. disposition led to numbers of unfair results in the eyes of a significant minority of grantee lawyers.

Cutting in the other direction, the grantee lawyers did not harshly judge the Board Member presiding over their particular cases. He or she was seen as very impartial in 22 cases (28%), as impartial in 41 (51%), and as biased 17 times (22%). See Table 8B, infra. The mean score on this question, 3.2 of 4, was the same as the mean result for all questions. See Table 8A, infra. And the percentage of grantee lawyers answering negatively on this question --22%--was not greatly higher than the negative answers on all questions: 16%. See Table 8B, infra. We may conclude, therefore, that the Board Member is perceived as a competent judge with personal integrity operating under efficient, well-conceived procedures yet, in the eyes of a substantial minority, systematically biased in favor of the United States because of the Board's status as a United States agency. Many respondents suggested that GAB be made "independent" of the agency whose actions it reviews.

C. PERCEPTIONS BY PARTY REPRESENTED

Attorneys for the United States win five of every six dollars adjudicated at the Board and also five of every six disallowances [246]. Naturally, on the other side grantees are losing. One would expect this disparity in outcomes to translate into marked differences in attitudes about the Board. To measure such differences, we segregate, in Table 8B, infra, the questionnaire ratings by party represented [244].

A measurable difference is found in most categories, with grantee attorneys generally giving the Board lower ratings. But what is truly remarkable is the narrowness of the spread. Overall, grantee lawyers rated the Board as satisfactory or better in 83.5% of the ratings, while the United States attorneys did so at a 90.3% proportion. Similarly, the composite means are only .2 points apart, 3.3/4 for the U.S. attorneys, 3.1/4 for the grantee representatives. Ratings of Board personnel are even closer. And in evaluating Board efficiency, grantee lawyers gave GAB higher grades than the U.S. attorneys.

There is a marked difference in the perception of validity of case outcomes. In only 13% of the cases were grantee lawyers willing to say that the final outcome of a case was "very fair," compared to 42% of the other side. Also, 5% less grantee attorneys thought the case result to be "fair." Put in converse terms, a sizeable block of grantee attorneys were unhappy (n.25) or very unhappy (n.4) with the outcome of the case they litigated before the Board. The mean scores of the "fairness of outcome" question were significantly divergent: U.S., 3.36/4; Ge, 2.57/4. Part of the explanation appears to be that the GAB Members, while competent (grantee attorneys actually scored them higher than U.S. attorneys on "competence"), are perceived as partial to the United States. On impartiality, U.S. lawyers rated the Members 3.44/4, while grantee lawyers 3.03/4.

TABLE 8A. ATTORNEY RATINGS OF GAB PROCEDURES
PERSONNEL, EFFICIENCY AND OUTCOMES

QUESTION	VERY INFREQUENT STRONGLY APPROVE VERY FAIR VERY GOOD		INFREQUENT APPROVE FAIR ADEQUATE		NEUTRAL		FREQUENT DISAPPROVE UNFAIR INADEQUATE		VERY FREQUENT STRONGLY DISAPPROVE VERY UNFAIR VERY POOR		MEAN	MEDIAN
	No.	%	No.	%	No.	%	No.	%	No.	%		
Final Outcome?	31/127	24%	64/127	50%			27/127	21%	5/127	4%	3.0/4	3.0
Efficieny?	53/129	41%	62/129	48%			10/129	8%	4/129	3%	3.3/4	3.3
Chance to Present Case?	58/128	45%	59/128	46%			7/128	6%	4/128	3%	3.3/4	3.4
Notices?	60/131	46%	65/131	50%			4/131	3%	2/131	2%	3.4/4	3.4
Chance to Prove Facts?	73/130	56%	46/130	35%			8/130	6%	3/130	2%	3.5/4	3.6
Chance to Prove Law?	75/131	57%	50/131	38%			5/131	4%	1/131	1%	3.5/4	3.6
Discovery Opportunity?	15/118	13%	74/118	63%			18/118	15%	11/118	9%	2.8/4	2.9
Deadlines?	35/131	27%	85/131	65%			8/131	6%	3/131	2%	3.2/4	3.1
Accessibility GAB Opinions?	22/128	17%	39/128	31%			43/128	34%	24/128	19%	2.5/4	2.4
Issue Clarity?	59/108	55%	42/108	39%			3/108	3%	4/108	4%	3.4/4	3.6
Adversary Competance?	29/110	26%	71/110	65%			9/110	8%	1/110	1%	3.2/4	3.1
Fact Completeness?	40/108	37%	65/108	60%			2/108	2%	1/108	1%	3.3/4	3.3
Evidence GAPS?	26/105	25%	65/105	62%			13/105	12%	1/105	1%	3.1/4	3.1
Redundant Evidence?	23/106	22%	54/106	51%			22/106	21%	7/106	7%	2.9/4	2.9
Surprise Witness?	60/104	58%	37/104	36%			5/104	5%	2/104	2%	3.5/4	3.6
Judge's Evidence Rulings?	24/ 97	25%	64/97	66%			6/ 97	6%	3/ 97	3%	3.1/4	3.1
Telephone Hearing?	35/ 99	35%	51/99	52%			9/ 99	9%	4/ 99	4%	3.2/4	3.2
Judge's Competence?	60/131	46%	62/131	47%			8/131	6%	1/131	1%	3.4/4	3.4
Judge's Impartiality?	48/131	37%	62/131	47%			17/131	13%	4/131	3%	3.2/4	3.2
Judge's Use of Discretion?	30/127	24%	77/127	61%			14/127	11%	6/127	5%	3.0/4	3.1
TOTAL	856/2379	36%	1194/2379	50%			238/2379	10%	91/2379	4%	3.2/4	3.2

TABLE 8B. QUESTIONNAIRE RATINGS BY PARTY REPRESENTED

QUESTION	VERY INFREQUENT STRONGLY APPROVE VERY FAIR VERY GOOD			INFREQUENT APPROVE FAIR ADEQUATE			FREQUENT DISAPPROVE UNFAIR INADEQUATE			VERY FREQUENT STRONGLY DISAPPROVE VERY UNFAIR VERY POOR			MEANS		
	U.S.	GE	BOTH	U.S.	GE	BOTH	U.S.	GE	BOTH	U.S.	GE	BOTH	U.S.	GE	BOTH
Final Outcome?	42%(21)	13%(10)	25%(31)	54%(27)	49%(37)	51%(64)	2%(1)	33%(25)	21%(26)	2%(1)	5%(4)	4%(5)	3.36	2.57	2.95
Efficiency?	39%(19)	43%(34)	41%(53)	45%(22)	49%(39)	48%(61)	10%(5)	6%(5)	8%(10)	6%(3)	1%(1)	3%(4)	3.16	3.34	3.27
Chance to Present Case?	62%(31)	35%(27)	46%(58)	36%(18)	52%(40)	46%(58)	2%(1)	8%(6)	6%(7)	0%(0)	5%(4)	3%(4)	3.60	3.17	3.34
Notices?	46%(23)	46%(37)	46%(60)	52%(26)	48%(38)	49%(64)	2%(1)	4%(3)	3%(4)	0%(0)	3%(2)	2%(2)	3.44	3.38	3.40
Chance to Prove Facts?	68%(34)	48%(38)	56%(72)	28%(14)	41%(32)	36%(46)	2%(1)	9%(7)	6%(8)	2%(1)	3%(2)	2%(3)	3.62	3.34	3.45
Chance to Prove Law?	74%(37)	46%(37)	57%(74)	24%(12)	48%(38)	39%(50)	0%(0)	6%(5)	4%(5)	2%(1)	0%(0)	1%(2)	3.70	3.40	3.52
Discovery Opportunity?	18%(8)	10%(7)	13%(15)	80%(36)	51%(37)	62%(73)	0%(0)	25%(18)	15%(18)	2%(1)	14%(10)	9%(11)	3.13	2.57	2.79
Deadlines?	24%(12)	29%(23)	27%(35)	64%(32)	65%(52)	65%(84)	8%(4)	5%(4)	6%(8)	4%(1)	1%(1)	2%(3)	3.08	3.22	3.16
Accessibility GAB Opinions?	27%(13)	12%(9)	17%(22)	39%(19)	26%(20)	32%(39)	25%(12)	40%(31)	34%(43)	10%(5)	23%(18)	18%(23)	2.81	2.26	2.46
Issue Clarity?	62%(28)	50%(31)	55%(59)	29%(13)	45%(28)	38%(41)	2%(1)	3%(2)	3%(3)	7%(3)	2%(1)	4%(4)	3.47	3.44	3.44
Adversary Competence?	29%(13)	23%(15)	26%(28)	58%(26)	70%(45)	65%(71)	11%(5)	6%(4)	8%(9)	2%(1)	0%(0)	1%(1)	3.13	3.17	3.16
Fact Completeness?	41%(18)	35%(22)	37%(40)	57%(25)	62%(39)	60%(64)	0%(0)	3%(2)	2%(2)	2%(1)	0%(0)	1%(1)	3.36	3.32	3.33
Evidence Gaps?	36%(16)	16%(10)	25%(26)	57%(25)	66%(40)	62%(65)	5%(2)	18%(11)	12%(13)	2%(1)	0%(0)	1%(1)	3.27	2.98	3.11
Redundant Evidence?	27%(12)	18%(11)	22%(23)	43%(19)	57%(35)	51%(54)	21%(9)	21%(13)	21%(22)	9%(4)	5%(3)	7%(7)	2.88	2.87	2.66
Surprise Witness?	61%(27)	55%(33)	58%(60)	34%(15)	37%(22)	36%(37)	5%(2)	5%(3)	5%(5)	0%(0)	3%(2)	2%(2)	3.52	3.43	3.49
Judge's Evidence Rulings?	28%(11)	23%(13)	25%(24)	60%(24)	70%(39)	66%(63)	8%(3)	5%(3)	6%(6)	5%(2)	2%(1)	3%(3)	3.10	3.14	3.12
Telephone Hearing?	48%(21)	26%(14)	35%(35)	46%(20)	56%(31)	52%(51)	5%(2)	13%(7)	9%(9)	2%(1)	6%(2)	4%(4)	3.39	3.02	3.18
Judge's Competence?	52%(26)	43%(34)	46%(60)	36%(18)	54%(43)	47%(61)	10%(5)	4%(3)	6%(8)	2%(1)	0%(0)	1%(1)	3.38	3.39	3.38
Judge's Impartiality?	52%(26)	28%(22)	37%(46)	42%(21)	51%(41)	48%(62)	4%(2)	18%(14)	12%(16)	2%(1)	4%(3)	4%(3)	3.44	3.03	3.16
Judge's Use of Discretion?	30%(15)	20%(15)	24%(30)	56%(28)	63%(48)	60%(76)	6%(3)	15%(11)	11%(14)	8%(4)	3%(2)	5%(6)	3.08	3.00	3.03
General Rating: GAB Procedures (1-10)													7.54	6.66	7.01
General Rating: State Procedures (1-10)													6.0	6.69	6.58[a]
General Rating: Federal Procedures (1-10)													7.40	7.54	7.49
General Rating: GAB Judges (1-10)													7.06	6.92	7.02
General Rating: GAB Staff (1-10)													7.11	7.07	7.09
TOTAL	43.6% (411/943	31.1% 442/1421	36.1% 853/2364	46.7% 440/943	52.4% 744/1421	50.1% 1184/2364	6.3% 59/948	12.5% 177/1421	10.0% 236/2364	3.4% 32/943	4.1% 58/1421	3.8% 90/2364			
Composite Mean													3.30	3.10	3.18

TABLE 9C: QUESTIONNAIRE RATINGS BY CASE RESULT

QUESTION	VERY INFREQUENT STRONGLY APPROVE VERY FAIR VERY GOOD				INFREQUENT APPROVE FAIR ADEQUATE				FREQUENT DISAPPROVE UNFAIR INADEQUATE				VERY FREQUENT STRONGLY DISAPPROVE VERY UNFAIR VERY POOR				MEANS			
	WIN	SPLIT	LOSS	ALL	WIN	SPLIT	LOSS	ALL	WIN	SPLIT	LOSS	ALL	WIN	SPLIT	LOSS	ALL	WIN	SPLIT	LOSS	A
inal Outcome?	43%(21)	20%(7)	6%(2)	25%(30)	53%(26)	43%(15)	50%(18)	49%(59)	4%(2)	31%(11)	36%(13)	22%(26)	0%(0)	6%(2)	8%(3)	4%(5)	3.39	2.77	2.53	2
Efficiency?	43%(21)	54%(19)	26%(10)	41%(50)	43%(21)	34%(12)	66%(25)	48%(58)	12%(6)	3%(1)	8%(3)	8%(10)	2%(1)	9%(3)	0%(0)	3%(4)	3.27	3.18	3.34	3
hance to Present Case?	58%(29)	38%(13)	36%(13)	46%(55)	38%(19)	44%(15)	58%(21)	46%(55)	0%(0)	12%(4)	6%(2)	5%(6)	4%(2)	6%(2)	0%(0)	3%(4)	3.50	3.15	3.31	3
Notices?	42%(21)	49%(17)	55%(21)	48%(59)	56%(28)	37%(13)	45%(17)	47%(58)	2%(1)	9%(3)	0%(0)	3%(4)	0%(0)	6%(2)	0%(0)	2%(2)	3.40	3.29	3.55	3
hance to Prove Facts?	66%(33)	50%(17)	55%(21)	58%(71)	28%(14)	32%(11)	42%(16)	34%(41)	2%(1)	15%(5)	3%(1)	6%(7)	4%(2)	3%(1)	0%(0)	3%(3)	3.56	3.29	3.53	3
hance to Prove Law?	72%(36)	54%(19)	50%(19)	60%(74)	28%(14)	34%(12)	45%(17)	35%(43)	0%(0)	9%(3)	5%(2)	4%(5)	0%(0)	3%(1)	0%(0)	1%(1)	3.72	3.40	3.45	3
iscovery Opportunity?	11%(5)	16%(5)	14%(5)	13%(15)	78%(35)	39%(12)	64%(23)	63%(70)	4%(2)	26%(8)	19%(7)	15%(17)	7%(3)	19%(6)	3%(1)	9%(10)	2.93	2.52	2.89	2
eadlines?	30%(15)	29%(10)	24%(9)	28%(34)	58%(29)	63%(22)	71%(27)	63%(78)	8%(4)	6%(2)	5%(2)	7%(8)	4%(2)	3%(1)	0%(0)	2%(3)	3.14	3.17	3.18	3
ccessibility GAB Opinions?	18%(9)	15%(5)	19%(7)	18%(21)	39%(19)	24%(8)	24%(9)	30%(36)	33%(16)	35%(12)	35%(13)	34%(41)	10%(5)	21%(8)	27%(9)	18%(22)	2.65	2.26	2.41	2
ssue Clarity?	62%(26)	47%(14)	55%(16)	55%(56)	33%(14)	40%(12)	41%(12)	38%(38)	2%(1)	3%(1)	3%(1)	3%(3)	2%(1)	10%(3)	0%(0)	4%(4)	3.55	3.23	3.52	3
dversary Competence?	21%(9)	28%(9)	35%(10)	27%(28)	62%(26)	69%(22)	62%(18)	64%(66)	17%(7)	3%(1)	0%(0)	8%(8)	0%(0)	0%(0)	3%(1)	1%(1)	3.05	3.25	3.28	3
act Completeness?	41%(17)	32%(10)	39%(11)	38%(38)	55%(23)	65%(20)	61%(17)	60%(60)	5%(2)	0%(0)	0%(0)	2%(2)	0%(0)	3%(1)	0%(0)	1%(1)	3.36	3.26	3.39	3
vidence Gaps?	33%(14)	24%(7)	15%(4)	26%(25)	57%(24)	62%(18)	63%(17)	60%(59)	10%(4)	10%(3)	22%(6)	13%(13)	0%(0)	3%(1)	0%(0)	1%(1)	3.52	3.07	2.93	3
edundant Evidence?	29%(12)	20%(6)	15%(4)	22%(22)	48%(20)	50%(15)	63%(17)	53%(52)	21%(9)	20%(6)	11%(3)	18%(18)	2%(1)	10%(3)	11%(3)	7%(7)	3.02	2.80	2.81	2
urprise Witness?	64%(27)	59%(17)	42%(11)	57%(55)	31%(13)	28%(8)	54%(14)	36%(35)	5%(2)	7%(2)	4%(1)	5%(5)	0%(0)	7%(2)	0%(0)	2%(2)	3.60	3.38	3.38	3
udge's Evidence Rulings?	33%(12)	25%(7)	15%(4)	25%(23)	58%(21)	57%(16)	85%(23)	66%(60)	6%(2)	11%(3)	0%(0)	6%(5)	3%(1)	7%(2)	0%(0)	3%(3)	3.22	3.00	3.15	3
elephone Hearing?	41%(16)	46%(12)	15%(4)	35%(32)	51%(20)	31%(8)	70%(19)	51%(47)	5%(2)	12%(3)	15%(4)	10%(9)	3%(1)	12%(3)	0%(0)	4%(4)	3.31	3.12	3.00	3
udge's Competence?	50%(25)	54%(19)	32%(12)	46%(56)	40%(20)	37%(13)	66%(25)	47%(58)	10%(5)	6%(2)	3%(1)	7%(8)	0%(0)	3%(1)	0%(0)	1%(1)	3.40	3.43	3.29	3
udge's Impartiality?	52%(26)	31%(11)	21%(8)	37%(45)	42%(21)	51%(18)	50%(19)	47%(58)	6%(3)	9%(3)	26%(10)	13%(16)	0%(0)	9%(3)	3%(1)	3%(4)	3.46	3.06	2.89	3
udge's Use of Discretion?	27%(13)	32%(11)	8%(3)	23%(27)	61%(30)	44%(15)	75%(27)	61%(72)	6%(3)	15%(5)	17%(6)	12%(14)	6%(3)	9%(3)	0%(0)	5%(6)	3.08	3.00	2.92	3
eneral rating: GAB Procedures (1-10)																	7.36	6.73	6.78	7
neral Rating: State Procedures (1-10)																	6.45	7.00	6.33	6
neral Rating: Federal Procedures: (1-10)																	7.43	7.44	7.56	7
neral Rating: GAB Judges (1-10)																	7.37	6.87	6.70	7
neral Rating: GAB Staff (1-10)																	7.25	7.16	6.91	7
TOTAL	42.2% 387/918	36.3% 235/647	29.1% 194/667	36.6% 816/2232	47.6% 437/918	44.0% 286/647	57.0% 380/667	49.4% 1103/2232	7.8% 72/918	12.1% 78/647	11.2% 75/667	10.1% 225/2232	2.4% 22/918	7.4% 48/647	2.7% 18/667	3.9% 88/2232				
mposite Mean																	3.30	3.09	3.12	3.

IX. OPPORTUNITIES TO BE HEARD

Pushing cases speedily through an adjudicative process may sacrifice party participation. The fewer events in a case, the quicker it can be resolved. From an instrumental perspective, curtailing "opportunities to be heard" may deprive the Board of relevant fact, law, policy data, and analysis, thereby leading to Board ineffectiveness in case results. Efficiently ineffective is not our goal in civil litigation. We want correct decisions efficiently reached.

We saw in Section VI how aggressively the Board shepherds each case by using multiple management techniques. While Section VIII taught us that attorneys for both sides are generally quite pleased with the Board's procedures and practices, including case management, we learned in Section VII that a significant number of grantee lawyers thought the result in their losing case to be "unfair" or "very unfair." This may be, of course, the natural grousing of lawyers who, caught up in the adversary system, come to convince themselves of the "justness" of their cause. But it may also be a perception caused or fed by the Board's tight case management. As one illustration, a sizeable number of attorneys practicing at the Board want broader discovery opportunities [248]. The view that a case result was unfair might have been formed on the basis of denied discovery which the attorney believed would have unearthed facts damaging to the other side.

We measured "opportunities to be heard" in several ways. One was to identify and count the various participatory requests in the 274 cases sampled. We looked for the different opportunities sought and the Board's disposition of such motions, petitions, and requests. We started with an inventory of participatory requests typically found in civil litigation and added the new ones we uncovered in our scrutiny of case files. Table 9A, below, contains our inventory of requests and the number of each found in the case files.

TABLE 9A: ATTORNEYS' PARTICIPATORY REQUESTS

	Request	No.
1.	FACT HEARING	21
2.	WITHDRAW APPEAL WITHOUT PREJUDICE	11
3.	CONSOLIDATE CASES	10
4.	SUMMARY DECISION	8
5.	DISCOVERY	7
6.	CONFERENCE	7
7.	SUBMIT DOCUMENT	6
8.	SUBMIT ADDITIONAL BRIEF	6
9.	INTERVENE	6
10.	ADVISORY OPINION	5
11.	MEDIATION	4
12.	GAB PROVIDE CERTAIN DATA	2
13.	PARTICULAR PERSON BE PRODUCED	2
14.	SUMMARY JUDGMENT	2
15.	CHANGE OF VENUE	1
16.	SUBSTANTIVE CHANGE IN TRANSCRIPT	1
17.	CHANGE FORMULATION OF ISSUE	0
18.	ADD AN ISSUE	0
		99

What surprised us most about this inventory was the small size of the count. The attorneys who practice at GAB do not seem to press very hard for opportunities to be heard beyond what the Board offers in its standard procedural formats. The often expressed idea that case delay and inefficiency is bred by lawyers engaged in procedural maneuvering is not confirmed by the litigation experience at the Board. Nor can it be said that the paucity of participatory requests is produced by the likelihood of denial. In fact, the Board granted 51 of the contested requests, compared to only 26 denials, the balance of requests being either withdrawn or resolved by party agreement.

Another way we measured "opportunities to be heard" was to collect and count side disputes: wrangling over technicalities unrelated to the case merits. This is what is commonly known as "motions" practice in state and federal court [249].

Consistent with our findings on participatory requests, we encountered few disputes divorced from the merits. What we mostly found were issues concerning the Board's jurisdiction over the particular subject matter or concerning the timeliness of the appeal. There were 26 jurisdictional issues injected into our sampled cases. Most of these controversies were initiated sua sponte by the Board Chair. The bulk of these peripheral matters, therefore, cannot be attributed to overly contentious attorneys.

Separating out matters of the Board's authority, what remained was only a handful of spats. We found eight instances when one side moved to impose sanctions upon the other for alleged procedural error, three motions to strike documents submitted by the adversary, one formal discovery motion pursued with briefs, and one motion to add a party claimed to be necessary.

In arguing side disputes, neither party submitted extensive briefs in the normal case. The attorneys for the appellant-grantees averaged only 3.7 pages in their briefs on these technical matters, compared to an average brief of ten pages in their main argument on the merits and an average reply brief of 8.3 pages. Briefs for the United States in side disputes averaged 6.2 pages, compared to an average 12.2 pages in their main briefs on the merits.

In summary, we found relatively few issues tangential to the merits being raised. When technical matters were placed in controversy, the parties did not invest substantial resources and energy in pursuing them.

As another measure of "opportunities to be heard" we asked the attorneys directly about their participatory opportunities and found, consistent with the above data, a high level of contentment with Board practice. As a general matter the lawyers believe that the Board's procedural tracks offer sufficient process for them to present their cases fully, with the exception of some attorneys who want freer discovery [250].

When asked about the "completeness of fact presentation" in the last case they litigated at the Board, 108 lawyers answered. 65 (60%) thought the facts were adequately complete and 40 (37%) believed the facts to have been very complete. One way or another, therefore, the Board manages to obtain a reasonably complete record of the facts underlying the dispute. We also asked the lawyers to rate their "opportunities to present facts," which focuses more narrowly on their personal litigation chances. Answers to this question demonstrated even greater respect for the Board with 56% (73/130) of the respondents replying "very fair" and 35% (46/130) replying "fair."

Lawyers have the opportunity to present their law by the normal means of main and reply briefs. Also, the Board will occasionally issue "Invitations to Brief" on important issues common to several appeals [251]. We further noted that many appellants inserted legal analysis and citation in their notices of appeal. Lawyers perceive these different "opportunities to present law" as quite satisfactory. Most of the 131 respondents, 57%, thought this aspect of Board practice to be "very fair," with the remainder mostly rating such opportunities as "fair" (38%). As we noted earlier [252], lawyers have not sought extra litigation advantages very frequently. We found in 274 case files only six requests to submit additional briefs.

Overall, there was a 91% rate of contentment with litigation opportunities. The response to the question "To what extent did the GAB procedures provide you with an opportunity to present all of the evidence and arguments favoring your side of the case?" is displayed in Table 9B below. We readily see that lawyers litigating at the Board believe that the heavy case management practiced there does not negatively affect their "opportunities to be heard."

TABLE 9B: LAWYERS' PERCEPTION OF OPPORTUNITIES TO BE HEARD

Rating	No.	%
VERY GOOD	58	45%
ADEQUATE	59	46%
INADEQUATE	7	6%
VERY POOR	4	3%

While grantee lawyers were less willing than their U.S. counterparts to rate Board opportunities as "very good," 35% versus 62%, most, 52% thought the opportunities adequate[253]. This combined rating of 87% satisfied is very impressive considering that grantee attorneys lose 80% of their cases at the Board and 80% of the dollars appealed [254].

X. CONCLUSIONS AND LIMITS THEREON

A. SYNOPSIS OF THE BOARD'S RECORD

The law's inefficiencies have commanded considerable national attention in the 1980's. Motored by the trenchant criticisms of respected legal scholars, a consensus is rapidly developing that the cost and delay of civil litigation must be combatted in substantial ways and that this is the duty of those who preside over courts and administrative boards. Many years ago the California Chief Justice pronounced his duty to be not merely the achievement of justice but the efficient achievement of justice [255]. He said:

> Every court has a responsibility to the public to see that justice is administered efficiently and expeditiously and that the facilities of the court are made available at the first possible moment to those whose cases are awaiting trial.[256]

It may be that other chief justices have likewise perceived their court management duties over the years, but only tinkering and patchwork [257] and little systemic improvement have occurred in response. Now that the plight of our courts is regularly surfacing as a matter of serious national concern, however, we have to hope that judicial efficiency will receive the attention and effort it deserves.

This study focuses on one promising approach: action-forcing procedures and aggressive case management by the judge to whom a case is assigned. We have attempted to measure empirically the results of certain case management procedures and techniques employed by the Grant Appeals Board in a conscious effort to improve the efficiency of its administrative adjudications.

Our empirical measurements, our questionnaire results, and our interviews have produced a composite picture of a hard-working administrative court which produces speedy resolutions of disputes involving substantial dollar sums. Based upon attorney evaluations and the upholding of most Board actions by federal courts, we can conclude further that the Board decides correctly as well as quickly. Cases worth $1.2 million on the average and $125,000 at the median get decided with a well-reasoned opinion about five months after the case is filed, with each case being given sufficient attention to please the legal representatives of the parties. Section VII revealed that lawyers are quite satisfied with the procedural system at GAB, discovery and publication of opinions being the only areas of significant discontent, and give solid overall ratings to the Board and its personnel. This evaluation is quite remarkable in light of the fact that grantee lawyers gave high grades to the Board for efficiency even though as a group they lost five-sixths of the cases they brought there.

In sum, we have found at GAB a successful adjudicatory system for processing civil disputes. The question now is whether the Board's procedures and practices could serve, in whole or part, as a model for court reform initiatives elsewhere. To try to answer this question, we shall first isolate those features of Board practice that seem particularly important to its success and then discuss factors which might limit the utility of Board procedures in other settings.

B. PEOPLE FACTORS

While this is primarily a study of procedural rules and techniques, we cannot overlook the human element. The combination of good people and good rules produces the Board's outstanding record, not one or the other alone. So, before analyzing the aspects of Board procedures which contribute most significantly to its high efficiency and effectiveness, we must relate our impressions about the human engines which drive the Board's procedures.

We have observed in the GAB Members a commitment to professional excellence and a deep pride in workmanship. One observer stated that the "single most important factor" underlying the Board's excellent record is the fact that its Members are high quality, hard-working judges with a universal commitment to excellence in process and excellence in result. Based upon our reading of Board opinions and case files, our observations of Members at work, and our interviews with them, we concur in this evaluation. The questionnaire results show that the attorneys practicing at the Board are in agreement too. It states almost the obvious to say that good procedures incompetently applied will produce inferior results. To some degree, therefore, this study necessarily presumes that those who adopt the Board's procedures, in whole or part, are comparably competent and enthusiastic in their application. Each court administrator must determine whether delay and inefficiency in his adjudicatory system is a product of poor procedures rather than personnel problems.

Other characteristics of the Members at GAB are important to an understanding of the Board's success. All of the Members bring to their jobs considerable prior experience in dealing with government procurement and grant-in-aid issues, and the stability of the Board's membership has enabled that experience to grow year by year. As one Member said, "We have been here so long this is our expertise." This means that each Member infuses each case with a sound general understanding of the policies, patterns, and practices of Congress and the Executive Branch in establishing programs under the Spending Power. They also possess deep understandings of specific statutes and regulatory material which they have had multiple opportunities to examine in earlier cases. This program expertise is reinforced by a case assignment system which is not random but which affirmatively places disputes in the hands of Members with relevant past adjudications.

Members consequently bring to most disputes a ready understanding of the issues and the parties' respective positions and, more importantly, enough substantive competence for them to engineer a sound decision even if the parties have failed to present their best cases. During interviews several Members emphasized their duty to decide cases correctly regardless of the competence of the party presentations. They do not hesitate to add issues overlooked by the parties, to suggest new areas for factual exploration, and to dig up relevant laws and regulations unknown to the adversaries. This most frequently happens in cases where the appellant is appearing pro se or by means of inexperienced counsel. In interviews agency counsel readily admitted using GAB as a training ground for aspiring litigators. In such a case, the Presiding Member will help him develop his case, leading to complaints by veteran litigators that the Board will sometimes "bend over backwards" in favor of appellants.

From the perspectives of this study, efficiency and effectiveness, such program expertise is a mixed blessing. It lengthens a case's processing time to add new issues, explore new facts, dig up new documentation, and find and assess new legal norms. It is faster and easier to take the cases as presented by the parties and to let them suffer the consequences of their neglects. But such a laissez faire approach sacrifices correct results on the merits. At the Board, the Members' approach, one which appears dissimilar to the "adversarial system" in American courts, is not merely to umpire the game of adversaries but to insure that the party with the better case wins.

This elevation of substance over form is heartening. It appears to stem from the public nature of the issues before the Board. The Board adjudicates entitlements to public revenues by applying norms derived from laws and regulations. Should it err in such adjudications the loser is not only the litigator, but also the public at large whose program goals have been undercut. For this reason adjudicators of public law disputes like Board Members tend to perceive their primary goal to be to the law rather than to the mere umpiring of an adversarial joust.[258] This is reflected in the Board's reluctance to impose sanctions against the United States for violations of Board orders and procedures if the effect is to deprive the U.S. Treasury of receipts to which it would otherwise be entitled [259].

Another important "people factor" underlying GAB's remarkable efficiency is the cooperative spirit among Board Members which enables them to reach consensus quickly. This is reflected in the publication of almost 800 three-Member opinions without one dissent and with but one concurring opinion. A Member said the Board is comprised of "like-minded people." We take this to mean a sharing of professional understandings about technical matters rather than similarity in personal values. All Members are likely to read a grant-in-aid regulation the same way. The Board "is not the Supreme Court," as the Members say, meaning both that it does not have the Court's time and resources to pursue the filigree of policy debates and that its matters are mundane, technical, and somewhat arcane as opposed to the matters of intense personal importance which regularly wrench the high court.

A final observation is that Board Members are part of the federal government's personnel management system and are rated biannually on their performances. Written performance criteria, reproduced in Appendix F, are utilized by the Board Chair who is responsible for these ratings. Treating judges as personnel to be "managed" by a "superior officer" and by biweekly computer case status reports is as unusual in a judicial system as it is common in business and the executive branches of government. In interviews, Board Members believed that performance ratings worked subtly to maintain high levels of productivity and responsibility. They did not believe that the rating system in any way compromised their independence of judgment about the merits of cases. [260] Persons in charge of courts and boards elsewhere are advised to consider adopting modern personnel management techniques whenever the danger to independence of judgment can be avoided or minimized. If judges are not exempt from being efficient in the work for which they are paid, there seems to be little reason not to measure that efficiency periodically [261], as long as no effort is made to gauge the "accuracy" or "correctness" of their adjudicatory decisions.[262]

C. PROCESS FACTORS

In Section VI we described and quantified the various management techniques which Board Members utilize within the structure created by the rules of procedure, explained in Section IV-C. While each particular procedure and practice contributes in some way across the Board's caseload, certain of them appear to have a particularly powerful positive influence on Board efficiency and effectiveness.

Heading the list, we believe, is the assignment of cases to a "presiding" Board Member. Apart from jurisdictional preliminaries which are all handled by the Board Chair, each surviving case is assigned for processing to one Board Member. Although a panel of three ultimately determines the merits, the Presiding Member shapes it and moves it along from step to step. He or she rules on motions, plans and presides at the conference or hearing, and otherwise brings the case to the point of decision. This is, essentially, the "individual calendar system" which has proved effective in federal district court compared to the inefficient "master calendar system." [263] By assigning all responsibility to a single judge, the individual calendar system enables managers to ascertain where and why backlogs and breakdowns are occurring. The clear visibility of case progress puts pressure on the Members to effectuate the Board's case management goals and enables the Board Chair to "manage" performance by rating Board Members under written performance standards.

This is not to say that case schedules will not vary, both individually and in the aggregate, from Member to Member. Variations are normal because each case imposes different demands, the interstices of set "routines" have considerable flexibility and adjustability, and leeway exists for each Member to fashion a personal adjudicatory style. To illustrate, we learned that one Member averaged 147 days to resolve 42 full-cycle cases while another Member averaged 264 days for 29 full-cycle cases [264]. Still, we believe that GAB's "action-forcing" procedural system both minimizes such individual disparities [265] and keeps even the most deliberative judge on a reasonably fast track. In short, while large differences between cases make complete routinization impossible, management rules and techniques can avoid the inefficiencies inherent in the case "customization" so prevalent in state and federal court.

Also important to the Board's case management success is the appeal file system. Within a few weeks of the appeal's filing the Presiding Member has on his or her desk many of the documents containing the relevant case facts. To quote one Member, "the cases are off and running at an early date." [266] The notice of appeal has delineated the issues and the basis for the Agency's action. The appeal file now displays the background documentation. With these in hand, the Presiding Member may thoroughly familiarize himself or herself with the case facts, understand the issues and the parties' positions, begin to structure the process suitable to the case, and issue preliminary case management directives. [267] Any dispute preceded by party interactions which create a factual record is amenable to the appeal file approach.

Another important management technique is the "tracking" of cases based on amount-in-controversy and issue complexity. Because the Board generally does not rule on constitutional issues [268], it need not worry about cases with small dollars but important principles at stake. It may rely on the dollar amount appealed to ascertain the "worth" of cases and their respective claims to the Board's attention. So, unlike federal court where cases small in dollars and even principles get the same Federal Rules as the blockbusters [269], Board cases worth $25,000 or less, about 18% of the docket, are assigned to an expedited processing track. Such assignment takes maneuver options away from the lawyers and practically guarantees a fast, inexpensive disposition. In our case sample, such cases were decided on the merits an average of five months after being filed.

The Board of course recognizes that a $200 claim may involve difficult, complex questions of adjudicative fact "correctly" resolved only after an elaborate trial. Conversely, a $200 million dispute may involve only questions of law or simple fact resolved after a brief study of uncontroverted documents. The Board retains the power, therefore, of assigning cases to trial-type process when the case so merits. The important distinction from normal civil procedure is that the Board makes such assignments, not the lawyers. The lawyers cannot threaten an extended trial as a negotiating ploy, nor do they have free rein to waste valuable litigation resources on matters of small importance.

In practice as well as procedure the Board thwarts attorney maneuvers which contribute to delay. For example, in the case files we often found warnings that further time extensions would not be granted except under extraordinary circumstances. The Members are generous about granting the first or second request for more time, thereby stretching case disposition time by some 22 days on the average. But stern warnings accompanying such approvals have the effect of discouraging further requests for additional time. Here we see another important facet of Board practice leading to efficiency in disposition: the anti-dilatory attitude of Board Members. Possibly more important than action-forcing procedures are action-forcing attitudes on the part of judges, enforcement of procedures being at bottom wholly discretionary. The Board Members believe in the time disposition goals established by rule [270] and actively seek to accomplish them by discouraging dilatory tactics and enforcing the procedures as written. The fact that their own performances are being regularly measured may play some role in creating the pressure to move cases along rapidly. In comparison, most court systems permit attorneys to set a pace of litigation convenient to the attorneys' office caseload [271]. At the Board we noted a total rejection of such a judicial laissez-faire attitude.

The above anti-dilatory attitude may explain the comparative absence at the Board of "side disputes": wrangling about technical matters like pleading error, jurisdiction, and discovery, which consumes so much time, energy and resources in state and federal court. Attorneys practicing at the Board, half of whom have one or more prior litigations there, may sense that the Presiding Member will take a hostile view of dilatory and strategic motions and avoid all but the most well-founded petitions.

The absence of trial formalities also seems to contribute importantly to the Board's efficiency, and is another factor meriting emphasis. We found only a handful of formal hearings in the 274 cases sampled. At these hearings direct examination and cross-examination take place, but in a relatively casual, conversational style. In opening such hearings the Presiding Member reminds counsel that the formal rules of evidence do not apply. The routine includes the following statement:

> We try to preserve an informal atmosphere for this type of hearing, but we need to produce an orderly transcript, particularly since there are two other board members who will not be here all the time and will work only from the transcript.
>
> So generally we need to take the same care concerning oral presentation as we would in the courtroom. That is the witnesses and attorneys should speak slowly, clearly, one at a time, and avoid visual displays such as nods which will not get on the record.
>
> The board has always taken a liberal view of the rules of evidence in this type of proceeding, and except where I determine that evidence or testimony is clearly irrelevant, immaterial, or unduly repetitious, it will be included as set out in Section 1611(b) of the board's rules. So I ask the attorneys to try to keep to a minimum your objections based on evidentiary matter.
>
> There should be few exhibits introduced in this hearing because both sides have had ample opportunity to develop and add to the appeal file. If there are documents which either of you wish to introduce, would you follow the procedure, please, of handing a copy to the reporter for marking and a copy to opposing counsel, move introduction of the document. I will ask for objections; if there are none or the objection is overruled, the document will be admitted, and the board should be given a copy.

We encountered few or no evidentiary objections and rulings in the 17 hearing transcripts we studied. Most objections were handled informally by suggestions from the Presiding Member agreed to by counsel. In summary, we noted little of the gamesmanship and rituals so common in adjudicatory jury trials. The emphasis was on getting to the facts of the case, the policies behind the relevant grant rules, and the parties' respective positions on both. We suspect that an hour of "trial" time at the Board would translate into three or four hours in civil court and much more taking into account post-trial motions.

This trial efficiency becomes even more pronounced when the hearing format is the telephone conference. The relaxation of formal evidence rules and procedures similarly discourages technical objections, which are rarely noted. Further, the use of telephones seems to encourage attorneys and parties to "get to the point." In observing telephone conferences, listening to tapes, and reading transcripts, we observed little of the meandering typical of attorney examination of witnesses in civil court. The lawyers and witnesses addressed, usually directly and forthrightly, the questions posed by the Presiding Member in a pre-conference statement. Having had time to prepare responses, the parties quickly and directly answered the critical fact and policy questions raised by the Presiding Member.

The final Board practice which we think merits special attention is the active search by the Presiding Member for relevant facts, law, and policy. This may be, indeed, the most critical determinant of the Board's efficiency and effectiveness. Such Member activism, which occurs as early in the process as the acknowledgement of appeal, quickly and firmly channels the case along productive lines.

After studying the notice of appeal, a Member may issue a directive to the Agency to respond to matters not considered during the audit process. Having examined the notice of appeal, appeal brief, and appeal file, the Member might instruct the Agency to respond to a list of questions in its respondent's brief. After examining both briefs and the appeal file, a Member might ask the parties to satisfy, in further briefs or at a conference or hearing, the Member's information needs. These might be clarifications of documents submitted by the parties; or refinement of a party's factual or legal theories; or completion of the factual record; or further legal research. Members use the questioning technique systematically and intensively, disgorging from the parties whatever is needed to complete the record so that the final decision will be based on the merits and not the relative competence of the parties. In the 274 case files studied, we encountered 272 sets of questions, many cases having multiple sets.

In the process do the Members lose their neutrality and objectivity? They think not. One Member stated that her interventionism in completing the record might work to the advantage of the less competent party, but that once the record was complete she felt neutral in her weighing of facts and legal analysis. All Members conceived their duty as getting to correct results regardless of the parties' respective ability to marshall facts and to argue the law. Thus, even if subtle biases might attend their interventionism, which they did not admit, the price paid would be small compared to the large benefit of correct decisions.

While the grantee lawyers did give a significant negative vote on the question of Member bias, we read the data as meaning a general slant in favor of the United States, rather than bias in particular cases [272]. Indeed, legal representatives of the United States were more likely than grantee lawyers to complain that Member intervention in specific cases favored the other side, but there were only five such complaints [273].

D. LIMITING FACTORS

Certain characteristics of the cases and parties appearing at the Board partially explain its adjudicatory success. To the extent these characteristics are unique to Board litigation, they limit the results one might expect at a court or agency which adopts the Board's adjudicatory system. A good illustration is the high median and mean dollar value of the cases at the Board. While large economic stakes may motivate the parties to fight fiercely, they do not necessarily correlate with case complexity. Large dollar appeals at the Board sometimes involve only questions of statutory interpretation and simple ones at that [274]. Also, the audit process frequently brings the same issue and parties back for one or more subsequent disallowances. Using joint consideration techniques [275], the Board can run up its record of case and dollar adjudications with little extra effort. In summary, the fact that many zeroes are in controversy at the Board is quite unique and not an accurate measure of case complexity there.

One unique feature of Board adjudications is the cooperative and continuing nature of the programs within which controversies arise. We have written elsewhere about the "cooperative" essence of federal grants-in-aid, meaning that the parties to an assistance agreement have the common legal goal of providing the services defined in the statute, regulation, and agreement [276]. This means that dollar disputes at the Board sometimes have an almost surrealistic aura. By winning, the Agency defeats the grantee's ability to effectuate the program which the Agency is pledged to promote [277]. Enforcement of grant conditions does, of course, have a deterrent effect on other grantees, thereby keeping the national program on the route planned by Congress. But the fact that the litigants are generally partners and only sporadically adversaries does mollify the disputatiousness which might otherwise attend Board litigation. We hesitate to emphasize this factor, however, because Members have assured us that grantee attorneys, particularly state agency counsel, fight as vehemently and competently for "their" dollars as attorneys in the private sector.

A more important "limiting factor" is the considerable pre-processing of disputes which occurs before an appeal is filed at the Grant Appeals Board [278]. Months and even years of audit investigation and resolution have served to sharpen the factual and legal issues and to gather the documentary evidence relevant thereto. The fact that the Board receives a meaty package at the outset enables it to begin active case management right away--an opportunity generally not present in civil court where the starting case package is only the raw claims in the pleadings.

This limits the replicability of the Board's procedures to those cases which have a substantial prefiling record needing to be "fine-tuned" in court. Other government disputes with a substantial investigative file would qualify, as would business deals which have generated a substantial pre-dispute paper record. Government contract matters are natural candidates for the Board's adjudicatory system; indeed, the Board Chair said that his experience at boards of contract appeals inspired the 1981 GAB procedural reform.[279]

The Board system could also be a planned second stage of dispute resolution. Parties could first be channeled into a private dispute resolution mode, such as mediation, negotiation, or arbitration, which, should it fail in whole or part, can serve to produce a factual record and definition of issues. Board-type procedures can then pick up the dispute and provide a swift second-stage adjudicatory resolution. A major impediment to such a two-stage system is the rule normally attached to arbitration, mediation, and negotiation that the "record" of such a process is not to be admissible in court. Policy makers would have to determine whether such a confidentiality rule is so critical to the viability of stage one that it cannot be abandoned in favor of an effective and efficient stage two.

Even in civil court or ALJ proceedings unmodified by compulsory arbitration or the like, phase one might be a magistrate-directed discovery phase, with the product of that discovery forming the "appeal file" for the next phase which heavily borrows GAB processing techniques. [280] We suspect that this is what generally happens in complex cases in federal district court, though there may still be some ideas in this report of interest to federal judges who support aggressive case management.

Cases where facts are peculiarly within the possession of one party who has motivations to suppress them, such as conspiracy, fraud, or antitrust claims, are not suitable for the Board's procedural system, at least _ab initio_. The "merits" of such cases cannot be reached without affording one side ample opportunity to disgorge the facts possessed by the other. In most Board cases a substantial package of facts already exists at the time of appeal and is held by both sides. While the Board does some fact supplementation, its basic job is to determine the legal implications of facts which, for the most part, the parties do not contest. As we discussed above, the Board system may, nonetheless, be valuable as a second stage. The pre-processing which occurs at the Agency level and leads to the set of documents forming the appeal file could be replicated in other types of disputes as, for example, a discovery phase managed by a magistrate or a non-confidential negotiations phase. What arrives in court, then, might be a reasonably developed fact record, like the GAB appeal file, to which the judge can apply his managerial skills.

The dispute with strong fact conflicts is another category of case unsuitable for GAB methodology. When parties and witnesses are likely to distort and color the "truth," testing by cross-examination is essential, as are rules for authentication of documents. Estoppel issues at the Board may present issues of credibility, and the pressures of office may occasionally tempt a witness to color the truth, but these are not typical issues litigated at the Board. Usual "fact" is a matter of documentation kept in the normal course of government business with the controversy being one of meaning and effect rather than authenticity. Indeed, our case file study left us with the impression that the substantial majority of case facts in Board disputes are uncontroverted. Frequently the question was whether there were more relevant facts or documents to be placed in the record; rarely was the reliability of what was in the record a cause for concern.

E. CONCLUSIONS

We set out many pages and months ago to test a thesis empirically: That the Grant Appeals Board was operating an efficient and effective system for the adjudication of important disputes between the U.S. Department of Health and Human Services and its grantees. In 1981 GAB devised a set of procedures aimed at producing high quality decisions in efficient fashion [281]. Our study hoped to measure the result of that study. If what seemed to be a "success story" withstood our factual probing, we might have a model worthy of emulation elsewhere.

We have found such success at GAB. In the sections of this study we have reported the details of GAB's practices and procedures and the effects thereof in a random sample of 274 cases and in a questionnaire survey answered by 131 attorneys who practice at GAB. In summary, the Board is doing a superb job under a set of procedures worthy of careful study and selective adoption by adjudicatory bodies throughout the country.

We were commissioned by the Administrative Conference of the United States, whose charter is to recommend improvements in the functioning of administrative agencies of the United States. The recommendations in the next section are directed to that end. We hope that improvements in the scores of adjudicatory centers throughout the federal bureaucracy will be inspired by our findings.

But these are not natural limits on our findings and recommendations. Lessons are here to be learned by those in charge of civil adjudications wherever located: boards, commissions, ALJ's, municipal courts, county courts, administrative courts, federal courts. The cause of improved adjudication of American civil disputes is urgent. We hope our study contributes to that cause.

FOOTNOTES

[1] Fed. R. Civ. P. 1. See generally Subrin, "The New Era in American Civil Procedure," 67 A.B.A.J. 1648 (1981) (criticizing amendments to Fed. R. Civ. P. 11, 16, and 26 for their deemphasis of simplicity and uniformity). See also Resnik, "Failing Faith: Adjudicatory Procedure in Decline," 53 U. Chi. L. Rev. 494, 504 n.43 (1986) (drafters of federal rules interested in "keeping distinctions to a minimum") [hereinafter cited as RESNIK].

[2] See R. Cappalli, RIGHTS AND REMEDIES UNDER FEDERAL GRANTS (BNA 1979); R. Cappalli, FEDERAL GRANTS AND COOPERATIVE AGREEMENTS: LAW, POLICY AND PRACTICE , 3 vols. (Callaghan 1982) [hereinafter cited as FEDERAL GRANTS].

[3] We even find the FRCP's adopted, at times verbatim, as rules for administrative proceedings. See 1 Pa. Admin. Code $$31.1-35.251.

[4] See, e.g., Fed. R. Civ. P. 26(f) advisory committee note ("The committee believes that abuse of discovery, while very serious in certain cases, is not so general as to require ... basic changes ...."); Fed. R. Civ. P. 16 advisory committee note ("In many respects, the rule has been a success.").

[5] See, e.g., Shaffer v. Heitner, 433 U.S. 186, 211 (1977) ("We believe ... that the fairness standard of International Shoe can be easily applied in the vast majority of cases.") Compare, e.g., Broderick, "Compulsory Arbitration: One Better Way," 69 A.B.A.J. 64, 65 (1983) ("prompt and less expensive alternative") with A.Lind & J.Shapard, EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS (Federal Judicial Center 1983) (high percentage of trial de novo demands).

[6] See, e.g., Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).

[7] See, e.g., M. Rosenberg, THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE (1964).

[8] See, e.g., W. Gellhorn, WHEN AMERICANS COMPLAIN: GOVERNMENTAL GRIEVANCE PROCEDURES (1966).

[9] Mashaw, "The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims," 59 Cornell L. Rev. 772 (1974) [hereinafter cited as MASHAW].

[10] See, e.g., Rosenberg, "Devising Procedures That Are Civil to Promote Justice That is Civilized," 69 Mich. L. Rev. 797, 800 (1971)("bagful of tinkerings and patchings").

[11] Newman, "Rethinking Fairness: Perspectives on the

Litigation Process, " 94 Yale L. J. 1643 (1985) [hereinafter cited as NEWMAN].

[12] Bok, "A Flawed System of Law Practice and Training, " 33 J. Legal Educ. 570 (1983).

[13] See Frankel, "The Search for Truth-- An Umpireal View," 30 Record of the N.Y.C.B.A. 14 (1975); Frankel, "The Search for Truth: An Umpireal View," 123 U. Pa. L. Rev. 1031 (1975); Frankel, "The Adversary Judge, " 54 Texas L. Rev. 465 (1976).

[14] See, e.g., NEWMAN, supra note 11, at 1657; Flanders, CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS 5 (Federal Judicial Center 1977)[hereinafter cited as FLANDERS]; Flanders, "Case Management in Federal Courts: Some Controversies and Some Results," 4 Just. Sys. J. 135, 135-36 (1978).

[15] A controlled experiment would be one in which certain cases would be litigated through the "reformed" system while others followed the usual course. See generally M. Rosenberg, THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE 16-22 (1964). This would enable one to be sure that whatever different results obtained were the product of the "reforms" and not outside factors. Since we have no control group, the best we can do is empirically measure the GAB results, ascertain correlations, estimate the causes of certain phenomena, and be aware of other factors, unmeasured, which may have influenced the outcomes. See text at Section VI-A.

[16] For a general discussion of the characteristics which differentiate the alternative processes for resolving disputes, see S. Goldberg, E. Green & F. Sander, DISPUTE RESOLUTION ch. 1 (1985) [hereinafter cited as DISPUTE RESOLUTION].

[17] See text accompanying note 214, infra.

[18] See text accompanying note 150, infra.

[19] See, e.g., Adler et al, SIMPLE JUSTICE: HOW LITIGANTS FARE IN THE PITTSBURGH COURT ARBITRATION PROGRAM 8-12 (Rand Inst. for Civil Justice 1983).

[20] See Rosenberg, Rient & Rowe, "Expenses: The Roadblock to Justice," 20 Judges' J. 16-19 (1981) reproduced in DISPUTE RESOLUTION, supra note 16, at 300-306.

[21] See generally A. Lind & J. Shapard, EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS (Federal Judicial Center 1983).

[22] See, e.g., Verkuil, "The Ombudsman and the Limits of the Adversary System," 75 Colum. L. Rev. 845 (1975).

[23] F. James & G. Hazard, CIVIL PROCEDURE 300 (3d ed. 1985)

[hereinafter cited as JAMES].

[24] See notes 37-45,infra, and accompanying text.

[25] JAMES, supra note 23, at 300.

[26] See Alschuler, "Mediation With a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases," 99 Harv. L. Rev. 1808, 1823 (1986) [hereinafter cited as ALSCHULER].

[27] See RESNIK, supra note 1, at 545.

[28] See W. Brazil, SETTLING CIVIL SUITS 1, 44-45 (1985).

[29] See JAMES, supra note 23, at 299-300.

[30] See, e.g., L. Forer, MONEY AND JUSTICE; WHO OWNS THE COURTS (1984)(Philadelphia Court of Common Pleas); "Disorder in the Courts," Phila. Inquirer, Jan 26, 1986, at 1, cols. 1-4, 10A, cols. 1-5, 11A, cols. 1-5, 12-A, cols. 1-5; Jan. 27, 1986, at 1, cols. 1-3, 6A, cols. 1-5, 7A, col.1; Jan. 28, 1986, at 1, cols. 1-4, 8A, cols. 1-5, 9A, cols. 1-5, 10A, cols. 1-5; Jan. 30, 1986, at 1, cols. 1-6, 16A, cols. 1-5, 17A, cols. 1-5, 18A, cols. 1-5 (same).

[31] See JAMES,supra note 23, at 295-96.

[32] Galanter, "Reading the Landscape of Disputes: What We Know and Don't Know And Think We Know) About Our Allegedly Contentious and Litigious Society," 31 UCLA L. Rev. 4, 6-7 (1983) [hereinafter cited as GALANTER]. The word apparently comes from Manning, "Hyperlexis: Our National Disease, " 71 Nw. U. L. Rev. 767 (1977).

[33] GALANTER, supra note 32, at 63.

[34] Criminal, domestic relations, and tort caseloads have increased substantially, while property, contract, and commercial disputes have dropped significantly. Id. at 43.

[35] See GALANTER, supra note 32, at 45-47. See also Selvin, M. & Ebener, P.A., MANAGING THE UNMANAGEABLE: A HISTORY OF CIVIL DELAY IN THE LOS ANGELES SUPERIOR COURT 43-46 (Rand Institute for Civil Justice 1984) [hereinafter cited as SELVIN].

[36] See GALANTER,supra note 32, at 72. See also Friedman, "The Six Million Dollar Man: Litigation and Rights Consciousness in Modern America," 39 Md. L. Rev. 661 (1980).

[37] See Kaufman, "The Philosophy of Effective Judicial Supervision Over Litigation," 29 F.R.D. 207 (1961) quoting an address by Mr. Chief Justice Warren to the American Bar Association [hereinafter cited as KAUFMAN].

[38] Burger, "Isn't There a Better Way?," 68 A.B.A.J. 274 (1982).

[39] Newman, supra note 11, at 1644 ("Too many cases take too much time to be resolved and impose too much cost upon litigants and taxpayers alike.").

[40] Id. at 1643. And making the system more susceptible to uneven attorney quality, waste of client resources, and procedural manipulation by parties with large budgets. See RESNIK, supra note 1, at 523-24.

[41] Frankel, "The Adversary Judge," 54 Tex. L. Rev. 465, 483 (1976).

[42] See, e.g., Kaufman, supra note 37, at 207 ("The layman's greatest grievance with the legal profession and our legal processes is that he feels that justice follows too slow and tortuous a path in reaching its goal and that there is far too much reliance on what he considers 'technicalities'."); Schwarzer, "Managing Civil Litigation: The Trial Judge's Role," 61 Judicature 400, 401 (1978) ("The litigation explosion has created an unprecedented crisis in the administration of justice. The burgeoning volume, complexity and cost of civil litigation threatens to exhaust the resources of courts and litigants."); Peckham, "The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition," 69 Calif. L. Rev. 770 (1981)("[T]oday's massive volume of litigation and the skyrocketing costs of attorney fees and other litigation expenses have, by necessity, cast the trial judge in a new role, that of pretrial manager.") [hereinafter cited as PECKHAM].

[43] See L. Forer, MONEY AND JUSTICE: WHO OWNS THE COURTS (1984).

[44] Bok, "A Flawed System of Law Practice and Training," 33 J. Legal Educ. 570, 571 (1983).

[45] See, e.g., T. Church et al, JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS (National Center for State Courts 1978)[hereinafter cited as CHURCH]; SELVIN, supra note 35; FLANDERS, supra note 14.

[46] See CHURCH,supra note 45, at chs. 4,5; Flanders, "Case Management in Federal Courts: Some Controversies and Some Results," 4 Just. Sys. J. 147, 151 (1978).

[47] See FLANDERS, supra note 14, at ix, ch.2; Connolly & Lombard, JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: MOTIONS 56-57 (Federal Judicial Center 1980).

[48] See CHURCH, supra note 45 at 36 ("The differences in civil case disposition times between the two systems is striking. the mean disposition time of individual calendar courts is over 200 days faster than the mean of the master calendar courts.").

[49] See Connolly & Lombard, JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: MOTIONS 57-58 (Federal Judicial Center 1980).

[50] See CHURCH, _supra_ note 45, at 24 ("By whatever index chosen, it is apparent that size of court bears little relationship to civil processing time.").

[51] See SELVIN, _supra_ note 35, at 38; CHURCH, _supra_ note 45, at 27 :"The data suggest that civil judge caseload has little relation to civil case disposition time. Courts with heavy filings per judge can be either relatively fast or relatively slow." Of course, when caseload begins to produce backlog, the effect is to slow the pace of each case to disposition.

[52] See CHURCH, _supra_ note 45, at 33 (inverse relationship between settlement intensity and disposition time). See also SELVIN, _supra_ note 35, at 81-84.

[53] See CHURCH,_supra_ note 45, at 79-80; SELVIN, _supra_ note 35, at 103. Adding judges is likely to lead to a decrease in average productivity per judge.

[54] See SELVIN, _supra_ note 35, at 80.

[55] KAUFMAN, _supra_ note 37, at 207. See also Flanders, "Case Management in Federal Courts: Some Controversies and Some Results," 4 Just. Sys. J. 147 (1978)("Judicial supervision of the civil docket is a relatively new phenomenon in American courts.").

[56] KAUFMAN, _supra_ note 37, at 210-11, 213.

[57] _Id._ at 212.

[58] See generally Resnik, MANAGERIAL JUDGES (Rand Institute for Civil Justice 1982); Elliott, "Managerial Judging and the Evolution of Procedure," 53 U. Chi. L. Rev. 306 (1986) [hereinafter cited as ELLIOTT]; Flanders, "Case Management in Federal Courts: Some Controversies and Some Results," 4 Just. Sys. J. 147 (1978); Galanter, "The Emergence of the Judge as a Mediator in Civil Cases, " 69 Judicature 257 (1986).

For a monumental review of the aspirations underlying the original Federal Rules of Civil Procedure, as well as a comprehensive overview of current thinking and literature, see RESNIK, _supra_ note 1.

[59] See, _e.g.,_ Schwarzer, "Managing Civil Litigation: The Trial Judge's Role," 61 Judicature 400 (1978); PECKHAM, _supra_ note 42; Rubin, "The Managed Calendar: Some Pragmatic Suggestions About Achieving the Just, Speedy, and Inexpensive Determination of Civil Cases in Federal Courts," 4 Just. Sys. J. 135 (1978) [hereinafter cited as RUBIN]. There has been little such

activity in state court systems. See CHURCH, supra note 45, at 39.

[60] Cases are assigned to a particular judge for all purposes. See generally FLANDERS, supra note 14, at 13-15.

[61] For his preliminary status conference, Judge Peckham uses a telephone conference call with a reporter present rather than an actual meeting. PECKHAM, supra note 59, at 780.

[62] Data "strongly suggests that a great deal of the time during which most cases are pending is essentially lost. The lawyers are undoubtedly are busy, but they are busy on other cases." FLANDERS, supra note 14, at 69.

[63] See Neubauer, "Judicial Role and Case Management," 4 Just. Sys. J. 223 (1978). See also ELLIOTT, supra note 58, at 316-17; FLANDERS, supra note 14, at 17:

> The strongest findings of this project concern differences in the ways courts manage civil cases during the pretrial phases. The courts differ widely in the controls they exercise over preparation of civil cases. The degree of control is closely associated with the time required for each stage of a case, which also varies greatly among courts.

[64] See FLANDERS, supra note 14.

[65] See id. at xi-x.

[66] RUBIN, supra note 59, at 140.

[67] See R. Cappalli, RIGHTS AND REMEDIES UNDER FEDERAL GRANTS 172-73 (1979). See generally FEDERAL GRANTS, supra note 2, at $$1:03-1:16.

[68] See FEDERAL GRANTS, supra note 2, at $1:13.

[69] United States Dep't of Transp. v. Paralyzed Veterans of America, 54 U.S.L.W. 4854, 4857 (June 24, 1986).

[70] See Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 17 (1981). See generally FEDERAL GRANTS, supra note 2, at $10:10.

[71] 1 C.F.R. $305.82-2 (1986).

[72] See FEDERAL GRANTS, supra note 2, at $$11:04-11:06.

[73] In re: Louisiana Dep't of Health & Human Servs., HHS Grant App. Bd., Dec. No. 647 (May 9, 1985).

[74] In re: Pennsylvania Dep't of Pub. Welfare, HHS Grant App. Bd., Dec. No. 190 (June 17, 1981). See also In re: Illinois

Dep't of Public Aid, HHS Grant App. Bd., Dec. No. 733 (Mar.26, 1986).

[75] See In re: New York State Dep't of Social Servs., HHS Grant App. Bd., Dec. No. 673 (July 19, 1985).

[76] In re: Maryland Dep't of Human Resources, HHS Grant App. Bd., Dec. No. 706 (Nov. 21, 1985).

[77] In re: New Jersey Dep't of Human Servs., HHS Grant App. Bd., Dec. No. 648 (May 17, 1985), aff'd on reconsideration, Nov. 22, 1985.

[78] In re: New York State Dep't of Social Servs., HHS Grant App. Bd., Dec. No. 307 (May 28, 1982). See also In re: Oregon Dep't of Human Resources, HHS Grant App. Bd., Dec. No. 729 (Mar.20, 1986).

[79] See In re: California Dep't of Health Servs., HHS Grant App. Bd., Dec. No. 665, at p. 2 (June 28, 1985).

[80] See generally FEDERAL GRANTS, supra note 2, at $$4:24-4:54.

[81] See, e.g., In re: New York City Human Resources Admin., HHS Grant App. Bd., Dec. No. 720 (Jan. 30, 1986) (grant advances not accounted for constitute a debt to the United States); In re: Economic Opportunity Council of Suffolk County, Inc., HHS Grant App. Bd., Dec. No. 679 (Aug. 12, 1985) (grantee allowed to prove allowable costs actually paid).

[82] Id.

[83] See, e.g., In re: Area IV PSRO of Michigan, HHS Grant App. Bd., Dec. No. 651 (June 3, 1985) (employee deferred compensation plan). See generally FEDERAL GRANTS, supra note 2, at $$ 4:31-4:52.

[84] In re: Puerto Rico Office for Human Development, HHS Grant App. Bd., Dec. No. 474 (Nov.9,1983), aff'd sub nom., Puerto Rico v. United States, No. 84-0388 (D.P.R. April 19, 1985).

[85] In re: New York State Dep't of Social Servs., HHS Grant App. Bd., Dec. No. 151 (Feb. 26, 1981).

[86] See In re: Area IV PSRO of Michigan, HHS Grant App. Bd., Dec. No 651 (June 3, 1985).

[87] See In re: Ohio Dep't of Human Servs., HHS Grant App. Bd., Dec. No. 725 (Mar. 7, 1986).

[88] See In re: Utah Dep't of Social Servs., HHS Grant App. Bd., Dec. No. 750 (April 30, 1986).

[89] See generally FEDERAL GRANTS, supra note 2, at $5:11.

[90] See App. A at app. A, para.D.

[91] See FEDERAL GRANTS, supra note 2, at ch. 19.

[92] See id. at ch. 20.

[93] See id. at ch. 21.

[94] See id. at ch. 22.

[95] Sometimes under the particular wording of a grant statute the failure of a grantee to comply with grant conditions leads to "ineligibility" for the grant rather than the disallowance of certain costs incurred by an eligible grantee. See, e.g., In re: Maryland Dep't of Human Resources, HHS Grant App. Bd., Dec. No. 706, at pp. 5-7 (Nov. 21, 1985).

[96] See generally FEDERAL GRANTS, supra note 2, at $$6:04, 6:05, 6:16.

[97] See, e.g., In re: Effect of DEFRA Amendments on Utilization Control Disallowances, HHS Grant App. Bd., Dec. No. 655 (June 7, 1985).

[98] See, e.g., New York State Dep't of Social Servs., HHS Grant App. Bd., Dec. No. 628 (Mar. 19, 1985) (medicaid incentive payment for states which enroll the help of local governments in collecting from liable third parties).

[99] See, e.g., In re: National Urban Indian Council, HHS Grant App. Bd., Dec. No. 710 (Dec.5, 1985)(grant properly terminated where grantee stopped performing primary grant activities without justification).

[100] See generally FEDERAL GRANTS, supra note 2, at ch. 6.

[101] Compliance with certain grant conditions is often the subject of special reviews of all grantees. These may lead to multiple disallowances and appeals. See, e.g, In re: Maryland Dep't of Human Resources, HHS Grant App. Bd., Dec. No. 706, at pp. 8-9 (Nov. 21, 1985) (review of state's eligibility for supplemental child welfare grants).

[102] See 38 Fed. Reg. 9,906 (1973). For general discussions of the origin, growth, caseload and procedures of the Board, see FEDERAL GRANTS, supra note 2, at $$8:66-8:78.10 (rev. ed. 1985); 5 Mezines, Stein & Gruff, ADMINISTRATIVE LAW $54.08 (1984) [hereinafter cited as ADMINISTRATIVE LAW].

[103] Now the Department of Health and Human Services ("DHHS").

[104] In 1973 President Nixon began to fight inflation by impounding federal assistance. See FEDERAL GRANTS, supra note 2,

at $$4:05-4:08.

[105] See generally Office of Economic Opportunity, CATALOG OF FEDERAL DOMESTIC ASSISTANCE (Jan. 1973); 1969 LISTING OF OPERATING FEDERAL PROGRAMS COMPILED DURING THE ROTH STUDY, H.R. Doc. No. 91-177, 91st Cong., 1st Sess. (1969).

[106] See 45 C.F.R. pt. 16, apps. A-E (1977).

[107] See 38 Fed. Reg. 9,906 (1973).

[108] 37 Fed. Reg. 24,675 (1972).

[109] Id.

[110] 38 Fed. Reg. 9,907 (1973).

[111] Readers who wish to know more about the distinctions between "formula" and "discretionary" grants can refer to FEDERAL GRANTS, supra note 2, at $4:01.

[112] The Administrative Conference of the United States has declined to go beyond recommending "informal complaint mechanisms" to process such cases. See 1 C.F.R. $305.82-2 (1985) at para. III-A.

[113] The Board dropped this type of dispute from its jurisdiction in the 1981 revision of Part 16. See 46 Fed. Reg. 43,816 (1981); In re Life Planning/Health Servs., Inc., HHS Grant App. Bd., Dec. No. 343 (Sept. 28, 1982).

[114] For misrepresentation in its procural, for example.

[115] For a discussion of indirect costs and the establishment of rates, see FEDERAL GRANTS, supra note 2, at $$4:53-4:54.

[116] See 45 C.F.R. $ 16.10(d)(1977) ("In any case in which the head of the constituent agency modifies or reverses the initial decision of the Panel, he shall accompany such action by written statement of the grounds for such modification or reversal....").

[117] See 38 Fed. Reg. 9,907 (1973).

[118] See 45 C.F.R. $16.10(d)(1977).

[119] 45 C.F.R. $16.8(a)(1977).

[120] 40 Fed. Reg. 33,936 (1975).

[121] 37 Fed. Reg. 24,676 (1972).

[122] See 45 C.F.R. $16.8(b)(1977).

[123] See, e.g., 5 U.S.C. $556(c)("In ... determining claims for money or benefits ... an agency may, when a party will not be

prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.").

[124] See 43 Fed. Reg. 9,264 (1978), codified at 45 C.F.R. pt. 16, app. A, para. B(a)(1985).

[125] For detailed breakdowns, see Table 4C.

[126] This step had a curious history. Before 1981 the Board rules explicitly allowed the head of an HHS Constituent Agency to review and affirm, modify, or reverse the Board decision. See 45 C.F.R. $16.81 (1977). The 1981 proposal would have transferred that discretionary review power to the Secretary. 46 Fed. Reg. 1,649 (1981)(proposed to be codified at 45 C.F.R. $16.21). In the final regulation, however, the proposed solution was omitted because it provoked considerable opposition. See 46 Fed. Reg. 43,817 (1981). The Department was to study the matter further and, in the interim, the Board's decisions would be the final DHHS action. The matter seems to have been resolved, whether by conscious action or inertia, in favor of GAB finality because neither the original clause nor its proposed substitute has resurfaced to date.

[127] Telephone interview with John Settle, July 16, 1986.

[128] Some of this distrust still persists. One questionnaire respondent described the Board as a "kangaroo court that rubber stamps the wishes of the U.S."

[129] Wingate v. Harris, 501 F. Supp. 58 (S.D.N.Y. 1980).

[130] The Board's Chair, John Settle, and Member Judy Ballard were the chief architects of the new procedures. See ADMINISTRATIVE LAW, supra note 102, at $54.08[3][b].

[131] The goals are taken from the preamble to the proposed rules. See 46 Fed. Reg. 1,644 (1981).

[132] See 45 C.F.R. $74.304 (1985); FEDERAL GRANTS, supra note 2, at $8:68.

[133] 46 Fed. Reg. 1,644 (1981).

[134] See id.

[135] "The Board may, at the time it acknowledges an appeal or at any appropriate later point, request additional documents or information; request briefing on issues in the case; ...." 45 C.F.R. $16.9 (1985).

[136] 45 C.F.R. $16.4 (1985).

[137] "[T]he documents supporting the claim, tabbed and organized chronologically and accompanied by an indexed list identifying each document." 45 C.F.R. $16.8(a)(1)(1985).

[138] "[A]ny additional documents supporting the respondent's position, organized and indexed ...." 45 C.F.R. $16.8(b)(1)(1985).

[139] See Section VI-B.

[140] 46 Fed. Reg. 1,644 (1981).

[141] "The Board may ... issue orders to show cause why a proposed finding or decision of the Board should not become final; ..." 45 C.F.R. $16.9 (1985).

[142] See Table 6A.

[143] See 45 C.F.R. $16.10(a)(1985).

[144] 45 C.F.R. $16.4 (1985). The preamble to the final regulation emphasizes that the conference is not an evidentiary hearing and is, to the extent possible, confined in scope to the material in the appeal file. Thus, while parties can make oral presentations, such are intended to be analyses of the record and arguments based thereon.

[145] The conference format is normally established by preliminary telephonic scheduling conferences. See 45 C.F.R. $16.9 (1985) Such conference calls establish the time for the conference, identify disputed legal issues, determine procedures, and establish participants, including witnesses. See 45 C.F.R. $16.10(b)(1985).

[146] 45 C.F.R. $16.10(a) (1985).

[147] Compare DeFoor, II & Sechen, "Telephone Hearings in Florida," 38 U. Miami L. Rev. 593 (1984).

[148] See 45 C.F.R.$16.10(c)(4) (1985).

[149] The case files reveal either verbatim transcripts or summaries of the conference prepared by staff. Apparently, the Presiding Member and staff assistant will judge which type record would best serve the needs of the case. The rules imply a right to a verbatim transcript: "On request, a party will be sent one copy of the transcript." 45 C.F.R. $16.10(c)(1) (1985).

[150] 45 C.F.R. $16.12(d)(3) (1985).

[151] Because all disputes have been processed to some extent at the Agency level, the distinction is between informal and on-the-record proceedings, although the latter do not have to follow Federal Administrative Procedure Act formalities.

[152] See 45 C.F.R.$16.4 (1985).

[153] The rules do state in a section entitled "Summary of

procedures below" that "[c]onferences may be conducted by telephone conference call." 45 C.F.R. $16.4 (1985)(emphasis added).

[154] See ADMINISTRATIVE LAW, supra note 102, at pp.54-143 n.31, 54-150. A sixth Member was appointed in 1986. This Member does Part 16 work on a part-time basis; most of his work involves certain civil money penalties imposed in the medicare program.

[155] 45 C.F.R. $16.13 (1985).

[156] The Board has expressed doubts about its power to enforce deadlines against the Agency. It has stated that it may indirectly deter unreasonable delay by closing the record on a tardy Agency. See 46 Fed. Reg. 43,817 (1981).

[157] We have encountered an en banc decision in a major consolidated case. See In re: Effect of DEFRA Amendments on Utilization Control Disallowances, HHS Grant App. Bd., Dec. No. 655 (June 7, 1985).

[158] At the time of writing, only one concurrence in 754 opinions. This happened in In re: Vermont Agency of Human Servs., HHS Grant App. Bd., Dec. No. 338 (June 30, 1982).

[159] The Presiding Member signs last under Board customs.

[160] See generally ADMINISTRATIVE LAW,supra note 102, $54.08[3] at pp. 54-150 to 54-151.

[161] See note 124, supra, and accompanying text.

[162] Actual amounts appealed in 1984 and 1985, both over $500 million, show that recent appeals are even more valuable. See Table 4A.

[163] We treated the "summary decision," a form of summary judgment based on directly applicable precedents in parallel cases, as a full-cycle adjudication.

[164] See Section V-A.

[165] It is not one-third because a number of full-cycle cases have no dollar values assigned.

[166] See, e.g., GALANTER, supra note 32, at 28 (88% settlement rate).

[167] For descriptions of each procedure, see Section IV-C.

[168] See ADMINISTRATIVE LAW, supra note 102, at p.54-195.

[169] See text accompanying notes 112-115. These are: noncompliance terminations; cost rates and plans; voiding a grant; and denial of a noncompeting continuation award.

[170] The Board's decisions are not formally published. They are issued in typed, mimeographed form to the parties and are mailed free of charge to persons who have so requested.

[171] The appeal is technically filed when an appellant "submit[s]" a notice of appeal. See App. A at $16.7(a). That date is identified by postmark on the mailing envelope or date of hand delivery. GAB's responsibility to dispose of an appeal expeditiously can only commence when it has knowledge of the appeal.

[172] See Section V-E.

[173] 1984 Annual Report of the Director of the Administrative Office of the United States Courts at p. 192 [hereinafter cited as 1984 ANNUAL REPORT].

[174] See FLANDERS, supra note 14, at 25, table 9.

[175] See 1984 ANNUAL REPORT, supra note 173, at 286, table C-5.

[176] See CHURCH, supra note 45, at 11, table 2.1.

[177] See id. at 10, table 2.1.

[178] See id. at 10-11, table 2.1.

[179] See SELVIN, supra note 35, at 27.

[180] See App. A at $16.23.

[181] Id.

[182] See Table 5F.

[183] See Section X-B; App. F.

[184] See App. A at $16.15(b).

[185] See FEDERAL GRANTS, supra note 2, at $8:68.

[186] Time spans are legally counted by excluding the day the event occurs which sets a time period running and also excluding the last day if it is a Saturday, Sunday, or holiday. See App. A at $16.19.

[187] While the Chair initially inspects appeals for jurisdictional compliance, see App. A at app. A, para. G, it may be that he does not press timeliness questions absent Agency insistence with the same rigor that he inspects and dismisses for lack of subject matter jurisdiction. In an interview, the Board Chair stated that he issues a show cause order automatically whenever it appears on the face of the record (as when the

appellant's date of receipt is stamped on the disallowance notice) that the appeal is untimely.

[188] See App. A at $16.7(b).

[189] See Section V-D.

[190] Further special briefing occurs occasionally.

[191] See Church _et al_, PRETRIAL DELAY: A REVIEW AND BIBLIOGRAPHY 34-35 (Nat'l Center for State Courts 1978).

[192] See Ebener, COURT EFFORTS TO REDUCE PRETRIAL DELAY 39-42 (Rand Inst. for Civil Justice 1981).

[193] See App. A at $16.13.

[194] We found only one written objection to a time extension requested by the other party.

[195] The Board is empowered to "suspend cases which are not ready for review ...." See App. A at $16.13.

[196] See, _e.g._, Fed. R. Civ. P. 42(a).

[197] See FEDERAL GRANTS, _supra_ note 2, at $8:68 n.75.

[198] To a "main" case would be added "consolidated" ones. The main case would serve as the litigation vehicle for all cases. The same appeal file, briefs, conferences, hearings, and witnesses would serve for all. If many different states were joined, lead counsel might be agreed upon.

[199] This amount is swollen by three very large cases, two for $16 million each and one for $64 million, that were jointly considered.

[200] See App. A at $16.13.

[201] See App. A at $16.20.

[202] See Table 8A.

[203] See Table 8B.

[204] See Table 8C.

[205] See Section IV-D.

[206] See In re: Ohio Dept. of Human Servs., HHS Grant App. Bd., Doc. No. 725 (Mar. 7, 1986), _aff'd on reconsideration_, June 6, 1986.

[207] The appeal was for $8,008. One wonders whether a dismissal would be entered on the same facts in an $8 million

appeal.

[208] Correspondence on file with author concerning In re Illinois Dept. of Public Aid, Dkt. No. 83-192.

[209] Another Member viewed this incident differently, stating:

> I do not think it was "unfortunate" that we held a hearing. What was unfortunate was that the State did not fully develop the facts and the Agency had not fully developed its legal position to the point of considering the consequences. We thus took a long time to sort matters out. The reason our questions ultimately had the result they did was that we had developed expertise in reimbursement systems and indirect cost questions, as well as in the way Medicaid had implemented the timely claims requirement.

[210] See Table 8A.

[211] See FEDERAL GRANTS, supra note 2, passim; R. Cappalli, RIGHTS AND REMEDIES UNDER FEDERAL GRANTS (1979).

[212] See, e.g., J. L. Mashaw et al., SOCIAL SECURITY HEARINGS AND APPEALS xx (1978).

[213] Review is under "substantial evidence" and "arbitrary and capricious" standards. See, e.g., Illinois ex rel. Illinois Dep't of Pub. Aid, 609 F. Supp. 1421, 1426-27 (N.D. Ill. 1985).

[214] See 46 Fed. Reg. 1,645 (1981). The Board Members and staff attorneys have been trained in mediation techniques. Even though few cases have been successfully mediated, such training is valuable for the enhancement of interpersonal skills. Board Members stated that the training helped them manage their assigned cases.

[215] See Practice Manual: Departmental Grant Appeals Board 15-16 (first draft; undated) [hereinafter cited as PRACTICE MANUAL].

[216] See DISPUTE RESOLUTION, supra note 16, at pp. 485-87.

[217] Cf. Behre, "Arbitration: A Permissible or Desirable Method for Resolving Disputes Involving Federal Acquisition and Assistance Contracts?," 16 Pub. Cont. L. Rev. 66 (1986).

[218] See Section VI-B-9.

[219] 1984 ANNUAL REPORT, supra note 173, at 152.

[220] In 51 cases adjudicated by the Board, some portion of the appealed dollars, usually minor, was withdrawn from the Board's authority by settlement.

[221] See Section IV-D,

[222] See Table 8B.

[223] Id.

[224] See Table 4G.

[225] See App. E, question 16.

[226] Derived from Table 8A.

[227] Derived from Table 8C.

[228] Derived from Table 8B.

[229] See In re: New Jersey Dep't of Human Servs., HHS Grant App. Bd., Dec. No. 115 (Aug. 8, 1980), aff'd, New Jersey v. Department of Health & Human Servs., 670 F.2d 1284 (3d Cir.), cert. denied, 459 U.S. 824 (1982); In re: Montana Dep't of Social & Rehab. Servs., HHS Grant App. Bd., Dec. No. 119 (Sept.29, 1980), aff'd, Montana Dep't of Social & Rehab. Servs. v. United States Dep't of Health & Human Servs., No. CV-80-208-H (D. Mont. Feb. 10, 1982); In re: New Jersey Dep't of Human Servs., HHS Grant App. Bd., Dec. No. 135 (Nov. 28, 1980) & In re: New Jersey Dep't of Human Servs., HHS Grant App. Bd., Dec. No. 146 (Jan. 29, 1981) & In re: New Jersey Dep't of Human Servs., HHS Grant App. Bd., Dec. No. 153 (Feb. 27, 1981) & In re: New Jersey Dep't of Human Servs., HHS Grant App. Bd., Dec. No. 195 (June 30, 1981) & In re: New Jersey HHS Grant App. Bd., Dec. No. 199 (July 31, 1981),aff'd, New Jersey v. Department of Health & Human Servs., 670 F.2d 1262 (3d Cir. 1981); In re: California Dep't of Benefit Payments, HHS Grant App. Bd., Dec. No. 160 (Mar. 31, 1981), aff'd, California v. Heckler, No. 81-2443 (N.D.Cal. May 8, 1984), aff'd, 765 F.2d 149 (9th Cir. 1985); In re: Montana Dep't of Social & Rehab. Servs., HHS Grant App. Bd., Dec. No. 171 (April 30, 1981), aff'd, Montana Dep't of Social & Rehab. Servs. v. United States Dep't of Health & Human Servs., No. 77-78 (D.Mont. Nov. 1983 & June 28, 1984); In re: Washington Dep't of Social & Health Servs., HHS Grant App. Bd., Dec. No. 176 (May 26, 1981), aff'd, Washington v. Schweiker, No. C81-1197R (W.D. Wash. Feb 28, 1983), aff'd sub nom., Washington v. Heckler, 722 F.2d 1451 (9th Cir. 1984); In re: Colorado Dep't of Social Servs., HHS Grant App. Bd., Dec. No. 187 (May 31, 1981), reconsideration denied, In re: Colorado Dep't of Social Servs., HHS Grant App. Bd., Dec. No. 377 (Jan 27, 1983), aff'd, Colorado Dep't of Social Servs. v. Department of Health & Human Servs., 585 F. Supp. 522 (D. Colo. 1984), aff'd, 771 F.2d 1422 (10th Cir. 1985); In re: Maryland Dep't of Health & Mental Hygiene, HHS Grant App. Bd., Dec. No. 210 (Aug. 31, 1981), aff'd, Maryland v. United States, No. 132-82 (Ct. Cl. May 22, 1985); In re: Colorado Dep't of Social Servs., HHS Grant App. Bd., Dec. No. 218 (Sept. 30, 1981), aff'd, Colorado Dep't of Social Servs. v. Department of Health & Human Servs., No. 83-1395 (10th Cir. May 9, 1984); In re: Joint Consideration: Institutions for Mental Diseases, HHS Grant App. Bd., Dec. No. 231 (Nov. 30, 1981),rev'd, Connecticut, Dep't of Income Maintenance v. Schweiker, 557 F. Supp. 1077 (D. Conn.

1983), *rev'd sub nom.,* Connecticut Dep't of Income Maintenance v. Heckler, 731 F.2d 1052 (2d Cir. 1984), *aff'd,* 105 S. Ct. 2210 (1985); In re: Joint Consideration-Abortion Funding, HHS Grant App. Bd., Dec. No. 260 (Feb. 26, 1982), *aff'd,* Illinois *ex rel.* Illinois Dep't of Pub. Aid v. United States Dep't of Health & Human Servs., 594 F. Supp. 147 (N.D. Ill. 1984), *aff'd,* 772 F.2d 329 (7th Cir. 1985); In re: Massachusetts Dep't of Pub. Welfare, HHS Grant App. Bd., Dec. No. 262 (Feb. 26, 1982), *rev'd,* Massachusetts *ex rel.* Dep't of Pub. Welfare v. Secretary of Health & Human Servs., 749 F.2d 89 (1st Cir. 1984), *cert. denied,* 105 S. Ct. 3478 (1985); In re: Michigan Dep't of Social Servs., HHS Grant App. Bd., Dec. No. 290 (April 30, 1982), *aff'd,* Michigan Dep't of Social Servs. v. Schweiker, 563 F. Supp. 797 (W.D. Mich. 1983), *aff'd sub nom.,* Michigan v. Secretary of Health & Human Servs., 744 F.2d 32 (6th Cir. 1984); In re: Hawaii Dep't of Social Servs. & Housing, HHS Grant App. Bd., Dec. No. 295 (May 7, 1982), *aff'd in pt. & rev'd in pt.,* Hawaii v. Heckler, No. 83-0506 (D. Hawaii June 21, 1984), *aff'd,* 760 F. 2d 1031 (9th Cir. 1985); In re: Florida Dep't of Health & Rehab. Servs., HHS Grant App. Bd., Dec. No. 296 (May 14, 1982), *aff'd,* Florida v. Heckler, No. 82-0935 (N.D. Fla. Jan. 5, 1984); In re: New York State Dep't of Social Servs., HHS Grant App. Bd., Dec. No. 311 (June 16, 1982), *aff'd,* Perales v. Heckler, 611 F. Supp. 333 (N.D.N.Y. 1984), *aff'd per curiam,* 762 F. 2d 226 (2d Cir. 1985); In re: Joint Consideration: Reimbursement of Foster Care Servs., HHS Grant App. Bd., Dec. No. 337 (June 30, 1982), *aff'd,* Oregon, Dep't of Human Resources & Children's Servs. Div. v. Heckler, No. 83-1466 (D. Ore. Feb. 6, 1984); In re: Maryland Dep't of Human Resources, HHS Grant App. Bd., Dec. No. 344 (Sept. 29, 1982), *aff'd,* Maryland Dep't of Human Resources v. Department of Health & Human Servs., No. 82-3402 (D.D.C. Oct. 12, 1983), *aff'd,* 763 F.2d 1441 (D.C.Cir. 1985); In re: Maryland Dep't of Human Resources, HHS Grant App. Bd., Dec. No. 358 (Nov. 29, 1982), *aff'd,* Maryland Dep't of Human Resources v. Department of Health & Human Servs., No. 83-586 (D. Md. Feb.1, 1984), *aff'd,* 762 F. 2d 406 (4th Cir. 1985); In re: North Carolina Dep't of Human Resources, HHS Grant App. Bd., Dec. No. 361 (Nov. 30, 1982), *aff'd,* North Carolina v. Heckler, 584 F. Supp. 179 (E.D.N.C. 1984); In re: Pennsylvania Dep't of Pub. Welfare, HHS Grant App. Bd., Dec. No. 398 (Mar. 18, 1983), *aff'd,* Pennsylvania, Dep't of Pub. Welfare v. Heckler, 730 F.2d 923 (3d Cir. 1984); In re: Ohio Dep't of Pub. Welfare, HHS Grant App. Bd., Dec. No. 453 (July 29, 1983), *aff'd,* Ohio, Dep't of Pub. Welfare v. Heckler, No. 2-84-0184 (S.D. Ohio July 31, 1985); In re: Illinois Dep't of Pub. Aid, HHS Grant App. Bd., Dec. No. 457 (July 29, 1983), *aff'd,* Illinois *ex rel.* Illinois Dep't of Pub. Aid v. Heckler, 616 F. Supp. 620 (N.D.Ill. 1985); In re: Puerto Rico Office for Human Dev., HHS Grant App. Bd., Dec. No. 474 (Nov.9, 1983), *aff'd,* Puerto Rico v. United States, No. 84-0388 (D.P.R. April 19, 1985); In re: Wisconsin Dep't of Health & Social Servs., HHS Grant App. Bd., Dec. No. 482 (Nov. 30, 1983) & In re: Wisconsin Dep't of Social Servs., HHS Grant App. Bd., Dec. No. 525 (Mar.30, 1984), *rev'd & remanded,* Wisconsin, Dep't of Health & Social Servs. v. Heckler, Nos. 84-C-75, 84-C-334, 84-C-682 (W.D. Wis. Dec. 11, 1984),*rev'd sub nom.,* Wisconsin

Dep't of Health & Social Servs. v. Bowen, 797 F.2d 391 (7th Cir. 1986); In re: Oklahoma Dep't of Human Servs., HHS Grant App. Bd., Dec. No. 484 (Nov. 30, 1983), aff'd, Oklahoma, ex rel. Dep't of Human Servs. v. Heckler, No. 84-865 (W.D. Okla. Jan. 15, 1985); In re: Mississippi Medicaid Comm'n, HHS Grant App. Bd., Dec. No. 504 (Jan. 31, 1984), aff'd, Mississippi Medicaid Comm'n v. United States Dep't of Health & Human Servs., 633 F. Supp. 78 (S.D. Miss. 1985), aff'd mem., 786 F.2d 1161 (5th Cir. 1986); In re: Illinois Dep't of Pub. Aid, HHS Grant App. Bd., Dec. No. 517 (Feb. 29, 1984), aff'd, Illinois v. Heckler, 609 F. Supp. 1421 (D.C. Ill. 1985); In re: Granville House, Inc., HHS Grant App. Bd., Dec. No. 529 (April 1984), aff'd, 772 F. 2d 451 (8th Cir. 1985); In re: Vermont Dep't of Social & Rehab. Servs., HHS Grant App. Bd., Dec. No. 546 (June 27, 1984), rev'd, Vermont Dep't of Social & Rehab. Servs v. United States Dep't of Health & Human Servs., No. 84-325 (D. Vt. Aug. 28, 1985), rev'd, No. 85-6320 (2d Cir. Aug. 12, 1986); In re: Texas Dep't of Human Resources, HHS Grant App. Bd., Dec. No. 617 (Jan. 17, 1985), aff'd in pt. and remanded in pt. for clarification, Texas Dep't of Human Resources v. Heckler, No. 85-CA-183 (W.D. Tex. Oct. 9, 1985); In re: Maryland Dep't of Human Resources, HHS Grant App. Bd., Dec. No. 639 (April 15, 1985), aff'd, Massinga v. Bowen, No. 85-2340 (D.Md. Aug. 28, 1986).

We have not counted two cases which reversed Board decisions but whose reasoning was rejected by the courts of appeals of other circuits. See In re: Arkansas Dep't of Human Servs., HHS Grant App. Bd., Dec. No. 423 (April 29, 1983), remanded for further consideration, Arkansas v. Heckler, No. 83-467 (E.D. Ark. Sept. 17, 1984), reinstated after rehearing, In re: Arkansas Dep't of Human Servs., HHS Grant App. Bd., Dec. No. 717 (Jan. 8, 1986); In re: Missouri Dep't of Social Servs., HHS Grant App. Bd., Dec. No. 448 (June 30, 1983), rev'd, Department of Social Servs. v. Heckler, No. 84-4106 (W.D. Mo. Sept. 24, 1984).

[230] See In re: Hawaii Dep't of Social Servs. & Housing, HHS Grant App. Bd., Dec. No. 295 (May 7, 1982), aff'd in pt. & rev'd in pt., Hawaii v. Heckler, No. 83-0506 (D. Hawaii June 21, 1984), aff'd, 760 F.2d 1031 (9th Cir. 1985); In re: Pennsylvania Dep't of Pub. Welfare, HHS Grant App. Bd., Dec. No. 346 (Sept. 30, 1982), rev'd, Pennsylvania v. Department of Health & Human Servs., 723 F.2d 1114 (3d Cir. 1983); In re: Massachusetts Dep't of Pub. Welfare, HHS Grant App. Bd., Dec. No. 438 (May 31, 1983), rev'd, Massachusetts v. Heckler, 616 F. Supp. 687 (D. Mass. 1985); In re: Texas Dep't of Human Resources, HHS Grant App. Bd., Dec. No. 381 (Jan. 31, 1983), remanded for clarification, Texas Dep't of Human Resources v. Heckler, No. 83-CA-159 (W.D. Tex. Aug. 2, 1985), disallowance rev'd, In re: Texas Dep't of Human Servs., HHS Grant App. Bd., Dec. No. 381 (June 18, 1986).

[231] See, e.g., In re: Texas Dep't of Human Servs., HHS Grant App. Bd., Dec. No. 381 (June 18, 1986).

[232] See CHURCH, supra note 45, at 54. See also FLANDERS, supra note 14, at 69-70.

[233] We cannot be more precise because our reporting category was indefinite: "6 or more." See App. E, question 4.

[234] We scattered questions rather than organize them by category so as not to influence the responses.

[235] See Table 8A.

[236] See Section IV-D.

[237] See ELLIOTT, supra note 58, at 321-22 (worrying about standardless narrowing of issues by managerial judges).

[238] This is proportionately higher than the direct evaluation of Board procedures (7.01/10). We shall offer an explanation later. See Section VIII-C.

[239] See PRACTICE MANUAL, supra note 215, at 6-9.

[240] See Fed. R. Civ. P. 26(b) advisory committee note.

[241] See Section X-D.

[242] 424 U.S. 319 (1976).

[243] See PRACTICE MANUAL, supra note 215, at 9.

[244] See Insurance Corp. v. Compagnie des Bauxites de Guinee, 456 U. S. 694 (1982).

[245] For example, inadequate discovery favors the United States since the grantee has the burden of proving that the fiscal disallowance was unlawful. See FEDERAL GRANTS,supra, note 2, at $8:78. Indeed, placing such burden on one side can itself be seen as a procedural bias.

[246] See Section IV-D.

[247] See also Table 8C for a cross-tabulation of the views of winners, losers, and splitters. We attempted three other rating cross-tabulations: 1) number of cases an attorney had litigated at GAB; 2) number of years practicing law; and 3) date of last litigation at GAB. Such breakdowns produced too few attorneys reporting in several categories to have statistical meaning. Also, we noted few differences dramatic enough to pursue further.

[248] See Table 8A.

[249] For interesting information about the kinds and volume of motions filed in federal district courts, see Connolly & Lombard, JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: MOTIONS (Fed. Judicial Center 1980).

[250] See Table 8A. Although the Board will rarely order

discovery of the Agency, depositions or production orders for example, it will sometimes arrange for the Agency to agree to show specified documents to the appellant, or to make a person available for questions or to answer certain grantee interrogatories. This discovery by agreement often satisfies the appellant's need for information while avoiding formal motions and rulings. See generally PRACTICE MANUAL, supra note 215, at 8.

[251] See Table 6A.

[252] See Table 9A.

[253] See Table 8B.

[254] See Section IV-D.

[255] See Fuentes v. Tucker, 31 Cal.2d 1, 187 P.2d 752 (1947) (Gibson, C.J.).

[256] 187 P.2d at 754.

[257] See Rosenberg, "Devising Procedures That Are Civil to Promote Justice That is Civilized," 69 Mich. L. Rev. 797, 800 (1971).

[258] Cf. MASHAW, supra note 9, at 780 (adjudicating entitlements to benefits under public laws is a "regime of strict law").

[259] This reasoning applies with equal vigor to grantees' defaults since the law might direct public funds into their hands absent the procedural sanction.

[260] See generally Rosenblum, "Contexts and Contents of 'For Good Cause' as Criterion for Removal of Administrative Law Judges: Legal and Policy Factors," 6 Western N. Eng. L. Rev. 592, 620-33 (1984) (low productivity as cause for judge's removal).

[261] See, e.g., Annual Report of the Director of the Administrative Office of the United States Courts.

[262] Cf. MASHAW, supra note 9, at 791-804 (quality control systems applied to public benefit adjudications).

[263] See CHURCH, supra note 45, at 36.

[264] See Table 5E.

[265] See FLANDERS, supra note 14, at ix.

[266] Studies have shown that the early months a case sits on a federal district court docket are mostly lost, the attorneys being busy on other matters. See FLANDERS, supra note 14, at 69.

[267] In effect, the judge is supervising the lawyers' preparation and tactics rather than the client (or supervising officer), who is often unable or unwilling to perform this function. See generally ELLIOTT, supra note 58, at 330-32.

[268] The Board has yet to reach a constitutional issue, having found a statute or regulation on point and controlling in cases where constitutional issues were pressed.

[269] See Fed. R. Civ. P. 1. Differentiation is beginning to occur, as in the 1983 amendments which allow district judges to tailor discovery to the "amount in controversy" and the "needs of the case." See Fed. R. Civ. P. 26(b)(1). For an elaborate proposal to amend the federal rules to create a "fast track" option, see McMillan & Siegel, "Creating a Fast-Track Alternative Under the Federal Rules of Civil Procedure," 60 Notre Dame L. Rev. 431 (1985). See also RESNIK, supra note 1, at 547 (need special procedures for subsets of cases).

[270] See 45 C.F.R. $16.23 (1985).

[271] See CHURCH, supra note 45, at 54.

[272] See Section VIII-C.

[273] See Section VIII-B.

[274] See, e.g., In re: New York State Dep't of Social Servs., HHS Grant App. Bd., Dec. No. 673 (July 19, 1985).

[275] See Section V-F.

[276] See FEDERAL GRANTS, supra note 2, at $$1:03-1:06.

[277] See R. Cappalli, RIGHTS AND REMEDIES UNDER FEDERAL GRANTS 86 (1979).

[278] See Section IV-A.

[279] The impetus for the 1981 reform was more than academic. By that time GAB had inherited and accumulated a large backlog of unresolved disputes.

[280] Compare ALSCHULER, supra note 26, at 1845-59.

[281] See notes 130-131,supra, and accompanying text.

APPENDIX A: JURISDICTION AND PROCEDURES OF THE GRANT APPEALS BOARD, DEPARTMENT OF HEALTH AND HUMAN SERVICES

federal register

Monday
August 31, 1981

Part IV

Department of Health and Human Services

Office of the Secretary

Grant Appeals Board; Process for Appeals From Final Written Decisions

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

45 CFR Parts 16 and 74

Grant Appeals Board; Process for Appeals From Final Written Decisions

AGENCY: Department of Health and Human Services.

ACTION: Final rule.

SUMMARY: The Department of Health and Human Services (HHS) revises 45 CFR Part 16 to substitute new requirements and procedures applicable to disputes arising under certain HHS grant and cooperative agreement programs. HHS also adds certain related provisions to 45 CFR Part 74, which contains general requirements applicable to all HHS grant and cooperative agreement programs. The provisions will improve the Department's capability to provide a fair, quick and flexible process for appeals from final written decisions.

DATE: Effective September 30, 1981.

FOR FURTHER INFORMATION CONTACT: John Settle, Chair, Departmental Grant Appeals Board, Room 2004, Switzer Building, 330 C Street, S.W., Washington, D.C. 20201; Telephone: (202) 245–0222.

SUPPLEMENTARY INFORMATION:

I. Background

On January 6, 1981, HHS published a Notice of Proposed Rulemaking in the Federal Register containing proposed new requirements and procedures applicable to the Departmental Grant Appeals Board and those who use the Board's dispute resolution services (46 FR 1644). The rules below contain changes made in response to comments received.

II. Summary of comments and changes

Overall, the comments were very supportive of the proposed procedures. The few criticisms are discussed below.

Small cases. We invited comment on whether we should eliminate Board review of small cases, suggesting a threshold of $5,000. Comments were negative; furthermore, since we receive few cases under $5,000, the savings of time by the Board would be minimal. We therefore have not eliminated small cases from Board jurisdiction. The procedures do contain an expedited review process for cases of $25,000 or less (§ 16.12).

Subgrantees. One commenter argued that subgrantees of HHS grantees should have a right to appeal to the Board. We have not provided such a general right of access. The Board's primary responsibility is to deal with disputes between HHS and its grantees, and Board resources are not great enough to permit us to substantially expand our role. Furthermore, HHS has no direct relationship with the subgrantee, and disputes between the subgrantee and the grantee generally should be resolved between those parties. The rules do contain a provision (§ 16.16) under which a subgrantee which is the real party in interest can intervene if the appellant does not object, and any party with an identifiable interest in a case may, in the discretion of the Board, participate in the process in some lesser manner (for example, by submitting a brief).

Standard of review. One commenter suggested that the Board adopt a standard of review, such as a "substantial evidence" test. We have not done so because the wide range of programs the Board serves, and the complexity of issues within those programs, cannot be adequately covered by a single standard of review or burden of proof statement.

Conflict of interest. One commenter felt that the proposed rules were weak concerning potential conflicts of interest on the part of Board personnel. We have modified the provisions to state an affirmative but general standard, based on the Code of Judicial Conduct and case law such as *Cinderella Career & Finishing Schools, inc. v. FTC,* 425 F.2d 583, 591 (D.C. Cir. 1970). This case states that the test for disqualification is whether a disinterested observer could conclude that the decisionmaker "has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." Canon 3.C.(1) of the Code says that "a judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned," and lists examples of circumstances. The Board will use the Code and relevant case law as guidance in applying its rule (see § 16.5(d)).

Filing time limits. Three commenters felt the time frames in §§ 16.7 and 16.8 were too short. We have not modified these provisions, because we believe that the commenters failed to realize that the new provisions actually represent a substantial expansion of front-end filing time over existing regulations. Under provisions currently in effect, the grantee is required to file an application for review within 30 days after the adverse agency decision. The application for review contains both notice of an appeal and the appellant's substantive argument. Under the new rule, an appellant has 30 days to file a notice of appeal (which can be very brief) and then has a further 30 days to prepare its argument after the Board acknowledges the notice of appeal. Thus, §§ 16.7 and 16.8 more than double the amount of front-end time the appellant has to prepare its position.

In return for this expanded time at the beginning of the appeal, the Board expects greater completeness in grantee briefing, so that the Board will save time later by avoiding successive requests for information or briefing.

Uses of conferences. Section 16.10 has been modified slightly to clarify that the conference is provided not only to elicit answers to specific questions from the Board, but also to give the parties an opportunity to make an oral presentation. The Board still intends to keep the scope of the conference, to the maximum extent practicable, restricted to consideration of material in the appeal file. The conference is not an evidentiary hearing.

Electing a hearing. One commenter found § 16.11(a) too restrictive, reading it to mean that unless a party specifically requested a hearing at the outset of a case, none would be granted, regardless of the issues involved. The commenter suggested this would lead to *pro forma* requests for hearings in all cases. This interpretation was not intended, and we have added language to make it clear that the Board can respond to a later request for a hearing or can schedule one on its own.

Prehearing conferences and the record. One commentor stated that it was "uneasy" about § 16.11(b), which states that the Board, "after consulting with the parties," may reduce the results of an informal prehearing conference to writing in a document which would be made part of the record. The commenter felt that both parties should be given the opportunity of reviewing and commenting on what the Board proposes to include in the record. The Board intends to provide precisely that opportunity, and that is how the Board will interpret the "consulting" phrase.

Sanctions. Two commenters felt the provisions of § 16.15(b), providing for possible dismissal of an appeal for failure to meet deadlines, were too severe or unfair compared to penalties applicable to the HHS component. The procedures give the Board ample authority to accommodate the legitimate needs of grantees which need extensions for valid reasons, but we cannot allow unreasonable delays. The reason the procedures do not contemplate dismissal against the HHS component for failure to meet deadlines is that there is a substantial legal and policy question whether the Board could or should take an action effectively precluding HHS from recouping funds which HHS determined the grantee possesses or claims illegally, by virtue, for example, of having incurred an unallowable cost. If the HHS component does unreasonably delay, the Board can treat the HHS case as submitted for decision based on the record assembled to that point.

Secretarial review. The provision which provoked the most comments was proposed § 16.21(c), which provided that Board decisions would not be final and would be subject to modification in whole or part at the discretion of the Secretary. The Department continues to study whether Board decisions should be "final" or should be subject to Secretarial review. In order to avoid further delay in implementing the other provisions, these procedures are being published without § 16.21(c), and that section is reserved for the addition of a provision dealing with the matter of the finality of Board decisions. In the interim, the decisions of the Board will be the final administrative action of the Department on the matter in dispute.

Staying agency action. Several commenters objected to § 16.22(b), on the basis that it gives an HHS component too much authority to take action pending the outcome of the appeal. The range of actions an HHS component may take under the provisions of § 16.22(b) (1) through (3) are reasonably limited; the broadest authority is contained in § 16.22(b)(4), which provides for any other action "specifically authorized by statute or regulation." The latter provision merely restates what would be the rule even if this provision were not included here, and we believe that commenters' attention generally should focus on the adequacy or desirability of any specific provision of law or regulation that may be proposed by an HHS component to authorize or require predecision action. However, we have clarified § 16.22(b)(3). It is intended to apply only to certain Social Security Act programs in situations where a disallowance is taken, based on a report of actual expenditures, before the disallowed claim has ever been approved.

Provisions related to jurisdiction. The final rule adds disallowances under Title III of the Older American Act. Under a final rule published by the Social Security Administration (46 FR 29190, May 29, 1981), the Board will also review certain audit determinations, and provide a hearing on a proposed finding of "substantial failure," in disputes arising under section 221 of the Social Security Act.

One commenter expressed "disappointment" that the Board would rely so heavily on HHS component input in situations where Board jurisdiction is unclear, since we will be bound by an HHS opinion that is not clearly erroneous (Appendix A, Paragraph C). The determination that the Board should have jurisdiction for certain programs reflects a policy decision by Departmental managers. Thus, it would be inappropriate for the Board to extend jurisdiction to cases where we did not clearly have it. Furthermore, it is important to have a rapid decision-forcing mechanism in these unclear cases, to let the grantee and the agency involved know quickly what their review options are.

"Final" agency decisions. Concerning proposed § 74.304, one commenter observed that there can be a problem with an HHS component delaying a final decision, so that failure to provide a final decision should trigger a right to appeal. We have not included such a provision. It is administratively very difficult to determine the scope of an undefined dispute, and thus in most cases virtually impossible to adjudicate it. The Board's regulation does indicate that an agency should issue a decision "promptly." Board personnel who participate in agency training sessions continually try to impress upon agency personnel the need to issue timely final decisions, both to reduce legal and political risk and to foster good grantee/grantor relationships.

Minor wording changes. A number of other minor changes have been made to assure consistent terminology, to clarify meaning without substantial change, and to improve grammar and style.

III. Continuing comments invited

Although this is a final rule, we invite comment and criticism on a continuing basis, and we will make modifications in the future as they are needed. Please communicate with the Chair, Departmental Grant Appeals Board, Room 2004, Switzer Building, 330 C Street, S.W., Washington, D.C. 20201 (telephone 202/245–0222).

IV. Implementation

These procedures apply to all appeals filed on and after the effective date. These procedures also apply to all appeals pending on the effective date, to the extent practicable and not inconsistent with fairness to the parties. The Board will conduct all hearings and conferences in pending appeals in accordance with the new §§ 16.5, 16.10 and 16.11, but the parties in these cases are not required to duplicate earlier effort by developing the appeal file under new § 16.8. Unless the parties otherwise agree, the expedited process in § 16.12 does not apply to pending appeals. The Board will consult with the parties in each pending appeal concerning the transition to the new procedures, and will apply the old procedures where a party shows why they would be fairer in that appeal.

Accordingly, the Department amends 45 CFR as follows:

1. By revising Part 16 as follows:

PART 16—PROCEDURES OF THE DEPARTMENTAL GRANT APPEALS BOARD

Sec.
16.1 What this part does.
16.2 Definitions.
16.3 When these procedures become available.
16.4 Summary of procedures below.
16.5 How the Board operates.
16.6 Who represents the parties.
16.7 The first steps in the appeal process: the notice of appeal and the Board's response.
16.8 The next step in the appeal process: preparation of an appeal file and written argument.
16.9 How the Board will promote development of the record.
16.10 Using a conference.
16.11 Hearing.
16.12 The expedited process.
16.13 Powers and responsibilities.
16.14 How Board review is limited.
16.15 Failure to meet deadlines and other requirements.
16.16 Parties to the appeal.
16.17 Ex parte communications (communications outside the record).
16.18 Mediation.
16.19 How to calculate deadlines.
16.20 How to submit material to the Board.
16.21 Record and decisions.
16.22 The effect of an appeal.
16.23 How long an appeal takes.

Appendix A—What Disputes the Board Reviews.

Authority: 5 U.S.C. 301 and sections 1, 5, 6, and 7 of Reorganization Plan No. 1 of 1953, 18 FR 2053, 67 Stat. 631 and authorities cited in the Appendix.

§ 16.1 What this part does.

This part contains requirements and procedures applicable to certain disputes arising under the HHS programs described in Appendix A. This part is designed to provide a fair, impartial, quick and flexible process for appeal from written final decisions. This part supplements the provisions in Part 74 of this title.

§ 16.2 Definitions.

(a) "Board" means the Departmental Grant Appeals Board of the Department of Health and Human Services.

Reference below to an action of "the Board" means an action of the Chair, another Board member, or Board staff acting at the direction of a Board member. In certain instances, the provisions restrict action to particular Board personnel, such as the Chair or a Board member assigned to a case.

(b) Other terms shall have the meaning set forth in Part 74 of this title, unless the context below otherwise requires.

§ 16.3 When these procedures become available.

Before the Board will take an appeal, three circumstances must be present:

(a) The dispute must arise under a program which uses the Board for dispute resolution, and must meet any special conditions established for that program. An explanation is contained in Appendix A.

(b) The appellant must have received a final written decision, and must appeal that decision within 30 days after receiving it. Details of how final decisions are developed and issued, and what must be in them, are contained in 45 CFR 74.304.

(c) The appellant must have exhausted any preliminary appeal process required by regulation. For example, see 42 CFR Part 50 (Subpart D) for Public Health Service programs and Part 75 of this title for rate determinations and cost allocation plans. In such cases, the "final written decision" required for the Board's review is the decision resulting from the preliminiary review or appeal process. Appendix A contains further details.

§ 16.4 Summary of procedures below.

The Board's basic process is review of a written record (which both parties are given ample opportunity to develop), consisting of relevant documents and statements submitted by both parties (see § 16.8). In addition, the Board may hold an informal conference (see § 16.10). The informal conference primarily involves questioning of the participants by a presiding Board member. Conferences may be conducted by telephone conference call. The written record review also may be supplemented by a hearing involving an opportunity for examining evidence and witnesses, cross-examination, and oral argument (see § 16.11). A hearing is more expensive and time-consuming than a determination on the written record alone or with an informal conference. Generally, therefore, the Board will schedule a hearing only if the Board determines that there are complex issues or material facts in dispute, or that the Board's review would otherwise be significantly enhanced by a hearing. Where the amount in dispute is $25,000 or less, there are special expedited procedures (see § 16.12 of this part). In all cases, the Board has the flexibility to modify procedures to ensure fairness, to avoid delay, and to accommodate the peculiar needs of a given case. The Board makes maximum feasible use of preliminary informal steps to refine issues and to encourage resolution by the parties. The Board also has the capability to provide mediation services (see § 16.18).

§ 16.5 How the Board operates.

(a) The Board's professional staff consists of a Chair (who is also a Board member) and full- and part-time Board members, all appointed by the Secretary; and a staff of employees and consultants who are attorneys or persons from other relevant disciplines, such as accounting.

(b) The Chair will assign a Board member to have lead responsibility for each case (the "presiding Board member"). The presiding Board member will conduct the conference or hearing, if one is held. Each decision of the Board is issued by the presiding Board member and two other Board members.

(c) The Board staff assists the presiding Board member, and may request information from the parties; conduct telephone conference calls to request information, to clarify issues, or to schedule events; and assist in developing decisions and other documents in a case.

(d) The Chair will assure that no Board or staff member will participate in a case where his or her impartiality could reasonably be questioned.

(e) The Board's powers and responsibilities are set forth in § 16.13.

§ 16.6 Who represents the parties.

The appellant's notice of appeal, or the first subsequent submission to the Board, should specify the name, address and telephone number of the appellant's representative. In its first submission to the Board and the appellant, the respondent (i.e., the federal party to the appeal) should specify the name, address and telephone number of the respondent's representative.

§ 16.7 The first steps in the appeal process: the notice of appeal and the Board's response.

(a) As explained in 45 CFR 74.304, a prospective appellant must submit a notice of appeal to the Board within 30 days after receiving the final decision. The notice of appeal must include a copy of the final decision, a statement of the amount in dispute in the appeal, and a brief statement of why the decision is wrong.

(b) Within ten days after receiving the notice of appeal, the Board will send an acknowledgment, enclose a copy of these procedures, and advise the appellant of the next steps. The Board will also send a copy of the notice of appeal, its attachments, and the Board's acknowledgment to the respondent. If the Board Chair has determined that the appeal does not meet the conditions of § 16.3 or if further information is needed to make this determination, the Board will notify the parties at this point.

§16.8 The next step in the appeal process preparation of an appeal file and written argument.

Except in expedited cases (generally those of $25,000 or less: see § 16.12 for details), the appellant and the respondent each participate in developing an appeal file for the Board to review. Each also submits written argument in support of its position. The responsibilities of each are as follows:

(a) *The appellant's responsibility.* Within 30 days after receiving the acknowledgment of the appeal, the appellant shall submit the following to the Board (with a copy to the respondent):

(1) An appeal file containing the documents supporting the claim, tabbed and organized chronologically and accompanied by an indexed list identifying each document. The appellant should include only those documents which are important to the Board's decision on the issues in the case.

(2) A written statement of the appellant's argument concerning why the respondent's final decision is wrong (appellant's brief).

(b) *The respondent's responsibility*— Within 30 days after receiving the appellant's submission under paragraph (a) of this section, the respondent shall submit the following to the Board (with a copy to the appellant):

(1) A supplement to the appeal file containing any additional documents supporting the respondent's position, organized and indexed as indicated under paragraph (a) of this section. The respondent should avoid submitting duplicates of documents submitted by the appellant.

(2) A written statement (respondent's brief) responding to the appellant's brief.

(c) *The appellant's reply.* Within 15 days after receiving the respondent's submission, the appellant may submit a short reply. The appellant should avoid repeating arguments already made.

(d) *Cooperative efforts.* Whenever possible, the parties should try to develop a joint appeal file, agree to preparation of the file by one of them, agree to facts to eliminate the need for some documents, or agree that one party will submit documents identified by the other.

(e) *Voluminous documentation.* Where submission of all relevant documents would lead to a voluminous appeal file (for example where review of a disputed audit finding of inadequate documentation might involve thousands of receipts), the Board will consult with the parties about how to reduce the size of the file.

§ 16.9 How the Board will promote development of the record.

The Board may, at the time it acknowledges an appeal or at any appropriate later point, request additional documents or information; request briefing on issues in the case; issue orders to show cause why a proposed finding or decision of the Board should not become final; hold preliminary conferences (generally by telephone) to establish schedules and refine issues; and take such other steps as the Board determines appropriate to develop a prompt, sound decision.

§ 16.10 Using a conference.

(a) Once the Board has reviewed the appeal file, the Board may, on its own or in response to a party's request, schedule an informal conference. The conference will be conducted by the presiding Board member. The purposes of the conference are to give the parties an opportunity to make an oral presentation and the Board an opportunity to clarify issues and question both parties about matters which the Board may not yet fully understand from the record.

(b) If the Board has decided to hold a conference, the Board will consult or correspond with the parties to schedule the conference, identify issues, and discuss procedures. The Board will identify the persons who will be allowed to participate, along with the parties' representatives, in the conference. The parties can submit with their briefs under § 16.8 a list of persons who might participate with them, indicating how each person is involved in the matter. If the parties wish, they may also suggest questions or areas of inquiry which the Board may wish to pursue with each participant.

(c) Unless the parties and the Board otherwise agree, the following procedures apply:

(1) Conferences will be recorded at Department expense. On request, a party will be sent one copy of the transcript. The presiding Board member will insure an orderly transcript by controlling the sequence and identification of speakers.

(2) Only in exceptional circumstances will documents be received at a conference. Inquiry will focus on material in the appeal file. If a party finds that further documents should be in the record for the conference, the party should supplement the appeal file, submitting a supplementary index and copies of the documents to the Board and the other party not less than ten days prior to the conference.

(3) Each party's representative may make an oral presentation. Generally, the only oral communications of other participants will consist of statements requested by the Board or responses to the Board's questions. The Board will allow reply comment, and may allow short closing statements. On request, the Board may allow the participants to question each other.

(4) There will be no post-conference submissions, unless the Board determines they would be helpful to resolve the case. The Board may require or allow the parties to submit proposed findings and conclusions.

§ 16.11 Hearing.

(a) *Electing a hearing.* If the appellant believes a hearing is appropriate, the appellant should specifically request one at the earliest possible time (in the notice of appeal or with the appeal file). The Board will approve a request (and may schedule a hearing on its own or in response to a later request) if it finds there are complex issues or material facts in dispute the resolution of which would be significantly aided by a hearing, or if the Board determines that its decisionmaking otherwise would be enhanced by oral presentations and arguments in an adversary, evidentiary hearing. The Board will also provide a hearing if otherwise required by law or regulation.

(b) *Preliminary conference before the hearing.* The Board generally will hold a prehearing conference (which may be conducted by telephone conference call) to consider any of the following: the possibility of settlement; simplifying and clarifying issues; stipulations and admissions; limitations on evidence and witnesses that will be presented at the hearing; scheduling the hearing, and any other matter that may aid in resolving the appeal. Normally, this conference will be conducted informally and off the record; however, the Board, after consulting with the parties, may reduce results of the conference to writing in a document which will be made part of the record, or may transcribe proceedings and make the transcript part of the record.

(c) *Where hearings are held.* Hearings generally are held in Washington, D.C. In exceptional circumstances, the Board may hold the hearing at an HHS Regional Office or other convenient facility near the appellant.

(d) *Conduct of the hearing.* (1) The presiding Board member will conduct the hearing. Hearings will be as informal as reasonably possible, keeping in mind the need to establish an orderly record. The presiding Board member generally will admit evidence unless it is determined to be clearly irrelevant, immaterial or unduly repetitious, so the parties should avoid frequent objections to questions and documents. Both sides may make opening and closing statements, may present witnesses as agreed upon in the prehearing conference, and may cross-examine. Since the parties have ample opportunity to develop a complete appeal file, a party may introduce an exhibit at the hearing only after explaining to the satisfaction of the presiding Board member why the exhibit was not submitted earlier (for example, because the information was not available).

(2) The Board may request the parties to submit written statements of witnesses to the Board and each other prior to the hearing so that the hearing will primarily be concerned with cross-examination and rebuttal.

(3) False statements of a witness may be the basis for criminal prosecution under sections 287 and 1001 of Title 18 of the United States Code.

(4) The hearing will be recorded at Department expense.

(e) *Procedures after the hearing.* The Board will send one copy of the transcript to each party as soon as it is received by the Board. At the discretion of the Board, the parties may be required or allowed to submit post-hearing briefs or proposed findings and conclusions (the parties will be informed at the hearing). A party should note any major prejudicial transcript errors in an addendum to its post-hearing brief (or if no brief will be submitted, in a letter submitted within a time limit set by the Board).

§ 16.12 The expedited process.

(a) *Applicability.* Where the amount in dispute is $25,000 or less, the Board will use these expedited procedures, unless the Board Chair determines otherwise under paragraph (b) of this section. If the Board and the parties agree, the Board may use these procedures in cases of more than $25,000.

(b) *Exceptions.* If there are unique or unusually complex issues involved, or other exceptional circumstances, the Board may use additional procedures.

(c) *Regular expedited procedures.* (1) Within 30 days after receiving the Board's acknowledgment of the appeal (see § 16.7), each party shall submit to the Board and the other party any relevant background documents (organized as required under § 16.8), with a cover letter (generally not to exceed ten pages) containing any arguments the party wishes to make.

(2) Promptly after receiving the parties' submissions, the presiding Board member will arrange a telephone conference call to receive the parties' oral comments in response to each other's submissions. After notice to the parties, the Board will record the call. The Board member will advise the parties whether any opportunities for further briefing, submissions or oral presentations will be established. Cooperative efforts will be encouraged (see § 16.8(d)).

(3) The Board may require the parties to submit proposed findings and conclusions.

(d) *Special expedited procedures where there has already been review.* Some HHS components (for example, the Public Health Service) use a board or other relatively independent reviewing authority to conduct a formal preliminary review process which results in a written decision based on a record including documents or statements presented after reasonable notice and opportunity to present such material. In such cases, the following rules apply to appeals of $25,000 or less instead of those under paragraph (c) of this section:

(1) Generally, the Board's review will be restricted to whether the decision of the preliminary review authority was clearly erroneous. But if the Board determines that the record is inadequate, or that the procedures under which the record was developed in a given instance were unfair, the Board will not be restricted this way.

(2) Within 30 days after receiving the Board's acknowledgment of appeal (see § 16.7), the parties shall submit the following:

(i) The appellant shall submit to the Board and the respondent a statement why the decision was clearly erroneous. Unless allowed by the Board after consultation with the respondent, the appellant shall not submit further documents.

(ii) The respondent shall submit to the Board the record in the case. If the respondent has reason to believe that all materials in the record already are in the possession of the appellant, the respondent need only send the appellant a list of the materials submitted to the Board.

(iii) The respondent may, if it wishes, submit a statement why the decision was not clearly erroneous.

(3) The Board, in its discretion, may allow or require the parties to present further arguments or information.

§ 16.13 Powers and responsibilities.

In addition to powers specified elsewhere in these procedures, Board members have the power to issue orders (including "show cause" orders); to examine witnesses; to take all steps necessary for the conduct of an orderly hearing; to rule on requests and motions, including motions to dismiss; to grant extensions of time for good reasons; to dismiss for failure to meet deadlines and other requirements; to close or suspend cases which are not ready for review; to order or assist the parties to submit relevant information; to remand a case for further action by the respondent; to waive or modify these procedures in a specific case with notice to the parties; to reconsider a Board decision where a party promptly alleges a clear error of fact or law; and to take any other action necessary to resolve disputes in accordance with the objectives of these procedures.

§ 16.14 How Board review is limited.

The Board shall be bound by all applicable laws and regulations.

§ 16.15 Failure to meet deadlines and other requirements.

(a) Since one of the objectives of administrative dispute resolution is to provide a decision as fast as possible consistent with fairness, the Board will not allow parties to delay the process unduly. The Board may grant extensions of time, but only if the party gives a good reason for the delay.

(b) If the appellant fails to meet any filing or procedural deadlines, appeal file or brief submission requirements, or other requirements established by the Board, the Board may dismiss the appeal, may issue an order requiring the party to show cause why the appeal should not be dismissed, or may take other action the Board considers appropriate.

(c) If the respondent fails to meet any such requirements, the Board may issue a decision based on the record submitted to that point or take such other measures as the Board considers appropriate.

§ 16.16 Parties to the appeal.

(a) The only parties to the appeal are the appellant and the respondent. If the Board determines that a third person is a real party in interest (for example, where the major impact of an audit disallowance would be on the grantee's contractor, not on the grantee), the Board may allow the third person to present the case on appeal for the appellant or to appear with a party in the case, after consultation with the parties and if the appellant does not object.

(b) The Board may also allow other participation, in the manner and by the deadlines established by the Board, where the Board decides that the intervenor has a clearly identifiable and substantial interest in the outcome of the dispute, that participation would sharpen issues or otherwise be helpful in resolution of the dispute, and that participation would not result in substantial delay.

§ 16.17 Ex parte communications (communications outside the record).

(a) A party shall not communicate with a Board or staff member about matters involved in an appeal without notice to the other party. If such communication occurs, the Board will disclose it to the other party and make it part of the record after the other party has an opportunity to comment. Board members and staff shall not consider any information outside the record (see § 16.21 for what the record consists of) about matters involved in an appeal.

(b) The above does not apply to the following: communications among Board members and staff; communications concerning the Board's administrative functions or procedures; requests from the Board to a party for a document (although the material submitted in response also must be given to the other party); and material which the Board includes in the record after notice and an opportunity to comment.

§ 16.18 Mediation.

(a) *In cases pending before the Board.* If the Board decides that mediation would be useful to resolve a dispute, the Board, in consultation with the parties, may suggest use of mediation techniques and will provide or assist in selecting a mediator. The mediator may take any steps agreed upon by the parties to resolve the dispute or clarify issues. The results of mediation are not binding on the parties unless the parties so agree in writing. The Board will internally insulate the mediator from any Board or staff members assigned to handle the appeal.

(b) *In other cases.* In any other grants dispute, the Board may, within the limitations of its resources, offer persons trained in mediation skills to aid in resolving the dispute. Mediation services will only be offered at the request, or with the concurrence, of a responsible federal program official in the program under which the dispute arises. The Board will insulate the mediator if any appeal subsequently arises from the dispute.

§ 16.19 How to calculate deadlines.

In counting days, include Saturdays, Sundays, and holidays; but if a due date would fall on a Saturday, Sunday or federal holiday, then the due date is the next federal working day.

§ 16.20 How to submit material to the Board.

(a) All submissions should be addressed as follows: Departmental Grant Appeals Board, Room 2004, Switzer Building, 330 C Street SW., Washington, D.C. 20201.

(b) All submissions after the notice of appeal should identify the Board's docket number (the Board's acknowledgement under § 16.7 will specify the docket number).

(c) Unless the Board otherwise specifies, parties shall submit to the Board an original and two copies of all materials. Each submission other than the notice of appeal, must include a statement that one copy of the materials has been sent to the other party, identifying when and to whom the copy was sent.

(d) Unless hand delivered, all materials should be sent to the Board and the other party by certified or registered mail, return receipt requested.

(e) The Board considers material to be submitted on the date when it is postmarked or hand delivered to the Board.

§ 16.21 Record and decisions.

(a) Each decision is issued by three Board members (see § 16.5(b)), who base their decision on a record consisting of the appeal file; other submissions of the parties; transcripts or other records of any meetings, conferences or hearings conducted by the Board; written statements resulting from conferences; evidence submitted at hearings; and orders and other documents issued by the Board. In addition, the Board may include other materials (such as evidence submitted in another appeal) after the parties are given notice and an opportunity to comment.

(b) The Board will promptly notify the parties in writing of any disposition of a case and the basis for the disposition.

(c) [Reserved]

§ 16.22 The effect of an appeal.

(a) *General.* Until the Board disposes of an appeal, the respondent shall take no action to implement the final decision appealed.

(b) *Exceptions.* The respondent may—

(1) Suspend funding (see § 74.114 of this title);

(2) Defer or disallow other claims questioned for reasons also disputed in the pending appeal;

(3) In programs listed in Appendix A, B.(a)(1), implement a decision to disallow Federal financial participation claimed in expenditures reported on a statement of expenditures, by recovering, withholding or offsetting payments, if the decision is issued before the reported expenditures are included in the calculation of a subsequent grant; or

(4) Take other action to recover, withhold, or offset funds if specifically authorized by statute or regulation.

§ 16.23 How long an appeal takes.

The Board has established general goals for its consideration of cases, as follows (measured from the point when the Board receives the first submission after the notice of appeal):

—for regular review based on a written record under § 16.8, 6 months. When a conference under § 16.10 is held, the goal remains at 6 months, unless a requirement for post-conference briefing in a particular case renders the goal unrealistic.

—for cases involving a hearing under § 16.11, 9 months.

—for the expedited process under § 16.12, 3 months.

These are goals, not rigid requirements. The paramount concern of the Board is to take the time needed to review a record fairly and adequately in order to produce a sound decision. Furthermore, many factors are beyond the Board's direct control, such as unforeseen delays due to the parties' negotiations or requests for extensions, how many cases are filed, and Board resources. On the other hand, the parties may agree to steps which may shorten review by the Board; for example, by waiving the right to submit a brief, by agreeing to shorten submission schedules, or by electing the expedited process.

Appendix A—What Disputes the Board Reviews

A. What this Appendix covers.

This Appendix describes programs which use the Board for dispute resolution, the types of disputes covered, and any conditions for Board review of final written decisions resulting from those disputes. Disputes under programs not specified in this Appendix may be covered in a program regulation or in a memorandum of understanding between the Board and the head of the appropriate HHS operating component or other agency responsible for administering the program. If in doubt, call the Board. Even though a dispute may be covered here, the Board still may not be able to review it if the limits in paragraph F apply.

B. Mandatory grant programs.

(a) The Board reviews the following types of final written decisions in disputes arising in HHS programs authorizing the award of mandatory grants:

(1) Disallowances under Titles I, IV, VI, X, XIV, XVI(AABD), XIX, and XX of the Social Security Act, including penalty disallowances such as those under sections 403(g) and 1903(g) of the Act and fiscal disallowances based on quality control samples.

(2) Disallowances in mandatory grant programs administered by the Public Health Service, including Title V of the Social Security Act.

(3) Disallowances in the programs under sections 113 and 132 of the Developmental Disabilities Act.

(4) Disallowances under Title III of the Older American Act.

(b) In some of these disputes, there is an option for review by the head of the granting agency prior to appeal to the Board. Where an appellant has requested review by the agency head first, the "final written decision" required by § 16.3 for purposes of Board review will generally be the agency head's decision affirming the disallowance. If the agency head declines to review the disallowance or if the appellant withdraws its request for review by the agency head, the original disallowance decision is the "final written decision." In the latter cases, the 30-day period for submitting a notice of appeal begins with the date of receipt of the notice declining review or with the date of the withdrawal letter.

C. Direct, discretionary project programs.

(a) The Board reviews the following types of final written decisions in disputes arising in any HHS program authorizing the award of direct, discretionary project grants or cooperative agreements:

(1) A disallowance or other determination denying payment of an amount claimed under an award, or requiring return or set-off of funds already received. This does not apply to

determinations of award amount or disposition of unobligated balances, or selection in the award document of an option for disposition of program-related income.

(2) A termination for failure to comply with the terms of an award.

(3) A denial of a noncompeting continuation award under the project period system of funding where the denial is for failure to comply with the terms of a previous award.

(4) A voiding (a decision that an award is invalid because it was not authorized by statute or regulation or because it was fraudulently obtained).

(b) Where an HHS component uses a preliminary appeal process (for example, the Public Health Service), the "final written decision" for purposes of Board review is the decision issued as a result of that process.

D. Cost allocation and rate disputes.

The Board reviews final written decisions in disputes which may affect a number of HHS programs because they involve cost allocation plans or rate determinations. These include decisions related to cost allocation plans negotiated with State or local governments and negotiated rates such as indirect cost rates, fringe benefit rates, computer rates, research patient care rates, and other special rates. The "final written decision" for purposes of Board review of these disputes is the decision issued as a result of the preliminary appeal process at Part 75 of this title.

E. SSI agreement disputes.

The Board reviews disputes in the Supplemental Security Income (SSI) program arising under agreements for Federal administration of State supplementary payments under section 1616 of the Social Security Act or mandatory minimum supplements under section 212 of Pub. L. 93–66. In these cases, the Board provides an opportunity to be heard and offer evidence at the Secretarial level of review as set out in the applicable agreements. Thus, the "final written decision" for purposes of Board review is that determination appealable to the Secretary under the agreement.

F. Where Board review is not available.

The Board will not review a decision if a hearing under 5 U.S.C. 554 is required by statute, if the basis of the decision is a violation of applicable civil rights or nondiscrimination laws or regulations (for example, Title VI of the Civil Rights Act), or if some other hearing process is established pursuant to statute.

C. How the Board determines whether it will review a case.

Under § 16.7, the Board Chair determines whether an appeal meets the requirements of this Appendix. If the Chair finds that there is some question about this, the Board will request the written opinion of the HHS component which issued the decision. Unless the Chair determines that the opinion is clearly erroneous, the Board will be bound by the opinion. If the HHS component does not respond within a time set by the Chair, or cannot determine whether the Board clearly does or does not have jurisdiction, the Board will take the appeal.

PART 74—ADMINISTRATION OF GRANTS

2. Part 74 of Title 45 of the CFR is amended as set forth below:

a. Subparts R and S are reserved as follows:

Subpart R—[Reserved]

Subpart S—[Reserved]

b. The table of contents is revised by adding entries for a new Subpart T, as follows:

* * * * *

Subpart T—Miscellaneous

Sec.
74.250–74.303 [Reserved]
74.304 Final decisions in disputes.

Subpart T—Miscellaneous

§§ 74.250–74.303 [Reserved]

§ 74.304 Final decisions in disputes.

(a) Granting agencies and other Departmental components attempt to promptly issue final decisions in disputes and in other matters affecting the interests of grantees. However, they do not issue a final decision adverse to the grantee until it is clear that the matter cannot be resolved informally through further exchange of information and views.

(b) Under various HHS statutes or regulations, grantees have the right to appeal from, or to have a hearing on, certain final decisions by Departmental components. (See, for example, Subpart D of 42 CFR Part 50 and 45 CFR Parts 16 and 75.) Paragraphs (c) and (d) of this section set forth the standards the Department expects its components to meet in stating a final decision covered by any of the statutes or regulations.

(c) The decision is brief but contains—

(1) A complete statement of the background and basis of the component's decision, including reference to the pertinent statutes, regulations, or other governing documents; and

(2) Enough information to enable the grantee and any reviewer to understand the issues and the position of the HHS component.

(d) The following or similar language (consistent with the terminology of the applicable statutes or regulations) appears at the end of the decision: "Thi is the final decision of the [title of grant officer or other official responsible for the decision]. It shall be the final decision of the Department unless, within 30 days after receiving this decision, you deliver or mail (you shoul use registered or certified mail to establish the date) a written notice of appeal to [name and address of appropriate contact; e.g., the Departmental Grant Appeals Board, Department of Health and Human Services, Washington, D.C. 20201]. You shall attach to the notice a copy of this decision, note that you intend an appea state the amount in dispute, and briefl state why you think that this decision i wrong. You will be notified of further procedures."

(e) If a decision does not contain the statement, information, and language described in paragraphs (c) and (d) of this section, the decision is not necessarily the granting agency's final decision in the matter. The grantee should notify the granting agency that wishes a formal final decision followi any further exchange of views or information that might help resolve th matter informally.

Dated: August 3, 1981.

Richard Schweiker,

Secretary.

[FR Doc. 81-25315 Filed 8-28-81; 8:45 am]

BILLING CODE 4110-12-M

APPENDIX B: PROJECT METHODOLOGY

I. PROJECT DESIGN

We knew generally that our task would be to measure the "effectiveness" and "efficiency" of the Grant Appeals Board, meaning a study of the workings of a particular court. Our natural starting place was, therefore, the literature of "court" or "adjudication" theory and practice, with special emphasis on empirical studies of judicial-type systems. After gathering some relevant works by routine use of card catalogs and literature indices, we started "networking" by contacting those writers, like Professors Maurice Rosenberg of Columbia and Laurens Walker at the University of Virginia, who dominate the literature. These personal contacts helped us identify institutions sponsoring research such as ours, namely:

- National Center for State Courts;
- American Bar Foundation;
- National Science Foundation, Division of Law and Social Science;
- Federal Judicial Center;
- Administrative Office of the United States Courts; and
- Rand Corporation, Institute for Civil Justice.

We called the research director of each of these institutions and studied their publications catalogs, thereby completing and updating our literature search and "networking."

The end result of this phase was a court theory and reform library of modest size. These works underlie Sections II and III, the analytical foundation of our study. We quickly ascertained the existence of a superabundance of studies, both empirical and experiential, of particular reform efforts of particular courts. These turned out to be much too narrow in focus to be helpful. Fortunately, there remained about one hundred works of sufficient breadth to guide our undertaking. From these we greedily borrowed ideas, definitions, empirical methodologies, and even forms and questionnaires.

Besides structuring our analysis and empirical methodology, we hoped to find several comparable court studies into which we could "plug" ourselves. Our good luck did not stretch so far. On the one hand, many studies were of such ample magnitude--thousands of cases in dozens of courts--that the researchers used only gross data about cases in such courts. On the other hand, many other studies focused on a particular practice or procedure in a single court or system of courts. In the end our project, which aims to study the workings of all significant procedures on the complete calendar of a single court, turned out to be unique. We were blessed in the opportunity to blaze some trails; we were cursed in our limited ability to compare our empirical findings with those of others.

II. CASE FILE DATA BASES

We would be working with closed cases at GAB by extracting from them data relevant to our measures of court success: speed; cost; impartiality; procedural fairness; flexibility; finality; effectiveness; and competence. In addition, while we knew about certain theoretical management practices from reading GAB's published procedures, we could learn about GAB's operational management practices from these case histories. Similarly, while we knew from our experience and readings what types of procedural opportunities lawyers normally request during litigation, in our study of the GAB closed cases we could identify and quantify the particular requests made in those disputes.

We started our data design by analyzing the GAB written procedures set forth in Appendix A and by studying several case files from different procedural "tracks." In Appendix C we reproduce the coding sheet that ultimately resulted. We refined it as we worked through the files.

A. Identification Data. The early items served to identify the file. The "case name," Item 1, is the title of the action, normally the name of the grantee organization appealing an adverse agency decision. "Docket #," Item 2, is the Board's code for identifying and filing cases. As in most court systems, cases are numbered seriatim as filed; 86-35 would be the 35th appeal filed in 1986. The Board's written decisions are numbered consecutively as rendered; so, "Decision #," Item 3, would be a single number between No. 268 and No. 672, the beginning and ending decisions rendered from the dockets which comprised our sample. Item 4, "Joint Consideration," represents the Board's practice of consolidating cases with common questions of law and fact. Here we would enter the other docket numbers (cases) being jointly considered with the case being coded. Item 5, "Appellant," is the name of the party bringing the appeal, and Item 7, "DHHS resp.,"is the Agency (operating division of DHHS) defending the case.

B. Standard Variables. A case's procedural history and substantive result might be affected by a number of variables, for example, the type of organization appealing. Item 6, "Type Grantee," represents this variable: state agency; university; non-profit organization; local government; and Indian tribe. Because the categories of variables are mostly self-explanatory, we will simply list them, and the main entries in each category, below.

Item 7. DHHS Respondent:

* Office of Child Support Enforcement (OCSE)
* Health Care Financing Adminstration (HCFA)
* Office of Human Development Services (OHDS)
* Social Security Administration

(SSA)
- Public Health Service (PHS)

Items 8 & 9. Program name/law:
- Child Support Enforcement Program (SSA, 4-D)
- Medicaid (SSA, 19)
- AFDC (SSA, 4-A)
- Social Services Program (SSA, 20)
- Headstart Program (Headstart Act)
- Low Income Energy Assistance Program (LIEAA)

Item 10. Type decision appealed:
disallowance (return; set-off)
noncompliance termination
denial of noncompeting continuation award
voiding of grant
cost allocation plans/rates

Item 14. Board members:
Ford
Settle
Ballard
Teitz
Garrett

Item 15. Staff Attorney:
Lauscher
Reines-Grubard
Stern
Horvath
Kaufman
Selzer
McFadden
Cafasso
Choppin
Ruiz-Sedivich-O'Hare
Rosenthal
Golkowicz
Young
Ballard
Stone
Jenner

Items 16-19. HHS Attorney:
85 different entries

Item 20. HHS Non-lawyer Repesentative:
15 different entries

Item 21. Grantee Attorney:
132 different entries

Item 24. Grantee Non-lawyer Representative:
80 different entries

C. Financial Data. We collected financial data about the "stakes" involved in each case and its financial results. "Total dollars appealed," Item 11, would serve as a measure of the magnitude of the disputes before the Board as well as their range. The next items, "Amount Settled" (12) and "Amount Adjudicated" (13), would serve to measure the Board's propensity, for whatever reason, to promote voluntary agreements between the parties as opposed to Board adjudications. For cases in which a Board decision was needed to resolve the financial claims, Items 45 to 48 captured the final financial results for each disallowance appealed, in other words, who won. We also coded for split decisions, remands, and settlements.

D. Case Complexity. Several variables could be used to measure the relative complexity of cases. The most important variable, Item 28a, was the procedural "track" to which the case was assigned. The possibilities were, in order of increasing complexity [1] :

* special expedited;
* expedited;
* written submissions;
* conference;
* hybrid conference; and
* hearing.

For each process involving a form of "hearing," whether formal or informal, we also ascertained in Item 28b whether the hearing was conducted by telephone or in person, and in Item 25 whether witnesses testified.

A significant number of cases never reached the "merits" but terminated prior thereto in one of the following ways: lack of Board jurisdiction; withdrawal of appeal; settlement; dismissal for procedural noncompliance; and dismissal without prejudice to reinstatement. These cases followed a different path to disposition and had to be measured separately for economy and efficiency. Item 27 recorded these instances, as well as the time required to dispose of them. Finally, we noted in Items 49 and 50 whether jurisdictional and other technical objections had appeared in the case by means of party motions or Board sua sponte action.

E. Resources Invested. The volume of paperwork generated by civil litigation may also reflect the degree of complexity of a case. One may assume that normally the size of briefs and appeal files is directly related to the number of facts, rules, and other matters involved in the dispute. In Item 29 we simply counted the number of pages of briefs, documents, and transcripts we encountered in each case file.

We had hoped to be able to measure the "cost" of litigating at GAB. However, it was impossible to get meaningful cost data directly. The great majority of attorneys practicing at the Board are salaried government employees, meaning no billings exist. We theoretically could have questioned the participating lawyers about the time spent in each case. We judged, however, that the small benefit of such an inquiry, given the likely unreliability of lawyer estimates was far outweighed by its cost. Tracking down the lawyers and asking them to remember their time spent on an old case was not feasible given the small project budget.

F. Processing Time. Careful recordkeeping by the Board enabled us to record the dates of action points and events. We listed such anticipated events in Item 30 and recorded the dates found on the documents in the files. In most cases the following procedures would appear chronologically [10]:

(a) final written decision;
(b) appeal filed;
(c) appeal received;
(d) appeal acknowledged;
(e) appellant's brief;
(f) respondent's brief;
(g) appellant's reply;
(h) first preliminary conference;
(i) second preliminary conference;
(j) conference or hearing;
(k) GAB decision.

Occasionally, additional material for the appeal file would be submitted at some time between submission of appellant's brief and the conference or hearing. Similarly, additional briefs might be submitted in this interval.

We measured appellants' and respondents' requests for time extensions and the Board's actions thereon. See Items 37-42. The project also tried to ascertain whether objections were lodged against such requests and whether GAB had granted lesser time extensions than the number of days requested.

Occasionally cases would be "stayed" (put on hold) pending the outcome of some event, such as a settlement negotiation or the decision of a parallel case. Items 43 and 44 recorded such stays, as well as information about the party making such a request.

G. Board Controls. The heart of the study would be the Board's use of case management techniques, which we called "Board controls." Several could be identified on the face of the Board rules, see Appendix A, and from the sample case files we used to design the search. As we executed the data collection phase we discovered several more. The list below contains the distinct management techniques we encountered and recorded in Item 31.

1. GAB formulates issue(s) in dispute;
2. parties required to submit specified information to Board or to other side (includes "order to develop record");
3. parties ordered to address written questions at a conference or hearing or by mail;
4. questions to clarify parties' legal positions, factual assertions, and significance of documents;
5. questions seeking information about facts or law;
6. parties directed to specify issues;

7. cases consolidated by Board;
8. establish procedure for side dispute;
9. locate hearing outside District of Columbia;
10. procedural directions to party;
11. order to show cause why tentative, adverse Board decision should not be finalized;
12. warning on time extensions and possible sanctions;
13. seek concessions from parties;
14. require specified person to be at conference or hearing;
15. order to respond to tentative findings;
16. detailed preliminary analysis of issues and tentative findings;
17. parties ordered or invited to submit additional briefs;
18. Board separately dockets a disallowance item;
19. Board orders parties to file status reports;
20. parties ordered to identify witnesses and substance of testimony;
21. order to consider mediation;
22. ------------
23. summary decision

H. Participatory Requests. In Item 32 we registered information about distinct types of participation requested by parties to GAB litigation. For each such request we identified whether the request was made by appellant or respondent, whether there was opposition to the request, and what action the Board took on it.

Below are listed all types of participation requested by parties to GAB litigation. Requests were for:

1. fact hearing;
2. discovery;
3. submit document;
4. put on witness (none found);
5. add an issue (none found);
6. change procedural "track";
7. conference;
8. submit additional brief;
9. change formulation of issue (none found);
10. information (e.g., past case record) from GAB;
11. presence of particular person/party requested in litigation;
12. make substantive changes in transcript;
13. intervene;
14. advisory opinion;
15. mediation;
16. withdraw appeal without prejudice to reinstatement;
17. change of venue;
18. consolidate cases;
19. motion for summary judgment;
20. summary decision;
21. leave to amend notice of appeal.

III. CASE SAMPLE

We started our sample of closed GAB cases with the first case subject to the new GAB procedures, Docket 81-172, which was filed (postmarked) on the effective date of the 1981 rules, September 30, 1981. We included every third closed case [3]. The Board separately dockets motions for reconsideration, which are simply extensions of the principal case; thus, we eliminated such dockets from our sample and chose the next valid docket. In Appendix D we list the 274 GAB dockets included in our sample. We closed the sample with Docket 85-79 (filed April 16, 1985; dismissed for non-prosecution on June 10, 1985). Because cases are continuously being decided and "closed," the sample is inevitably a smaller percentage of the total universe with each passing day.

The 274 cases in our sample represent 29.5% of the 927 cases docketed at the Board in the period between September 30, 1981 and April 16, 1985. The sample spans three years and seven months of Board activity. It included 137 cases, exactly 50% of the sample, which resulted in written Board opinions between March 31, 1982 (No. 268) and July 10, 1985 (No. 672).

IV. LAWYER QUESTIONNAIRE

While the raw data collected from the closed cases would provide an important statistical profile of the Board's efficiency, such data had to be contrasted with the perceptions of those practicing before the Board in order to obtain a complete picture. The questionnaire served several purposes. First, knowing the lawyers' general views as to the Board's set of procedures would help us understand the ease or difficulty of implementing such procedure both at the Board and elsewhere. We can call this the lawyers' "efficiency outlook." Lawyers from all parts of the country litigate at GAB; consequently, their views would represent those of a "national bar" and have particular importance. Based on legible postmarks, eighty questionnaires were returned from the following states:

Ariz. (1)
Cal. (4)
Colo. (3)
D.C. (7)
Fla. (1)
Ga. (1)
Ill. (6)
Iowa (1)
Kan. (3)
Ky. (1)
Me. (1)
Md. (7)
Mass. (1)
Mich. (1)
Minn. (2)
Miss. (1)
Mont. (1)
N.J. (4)
N.M. (1)
N.Y. (10)
Ohio (3)
Okla. (1)
Pa. (5)
S.D. (1)
Tenn. (1)
Tex. (3)
Utah (1)
Vt. (1)
Va. (2)
Wash. (4)
Wisc. (1)

Second, we could identify particular facets of Board practice which the attorneys strongly liked or disliked. This might serve as a helpful guide for the Board to improve its practices, as well as alerting reformers to troublespots--areas where efficiency reforms are likely to encounter stiff resistance from the bar.

Third, we knew of no reasonable method of ascertaining the "correctness" of Board decisions other than to ask the advocates and hope they would give objective views. We would, of course, double check by comparing their views with the particular results in their cases.

Fourth, we could measure the lawyers' sense of fair play. When both the judge and the defendant come from the same family, the plaintiff's sensibility to unequal treatment is acute. While the rules on their face were neutral, grantee lawyers might have a sense that some parties were "more equal than others."

The questionnaire, which is reproduced in Appendix E along with cover letters, was designed after we completed our study of the case files at GAB. By then we were alert, through file documents and conversations with Board members, to particular points of procedure, like discovery and accessibility of Board opinions, which appeared to be troublesome. We could, therefore, sprinkle general questions about procedural likes and dislikes with inquiries about more specific matters.

We did not have the resources to subject the questions to a verification process. The Board Members and staff reviewed them and made helpful suggestions. Dr. Larry Rosen reviewed them for built-in biases and other facial flaws. That the questions worked well is evidenced by the ease with which the respondents answered them. Very few questions went unanswered and the questionnaires were remarkably free from marginal notations indicating doubt about the questions

The questionnaire was administered on an anonymous basis. We compiled a mailing list from the case files dating back to 1981. Many of the names and addresses on the mailing list were doubtlessly of attorneys who had moved on to different work and who would never receive our mailing. The mailing list numbered 290; of these, we guess that about one-third are attorneys who no longer represent the grantee institution they represented at the time of the GAB litigation. We therefore guess that some 200 attorneys actually received the questionnaire. We received 131 completed questionnaires, or, roughly 65% of the reachable addressees.

We had no reason to correlate the attorneys who litigated the cases in our case file data base and those who answered the questionnaire. We could ascertain no reason why those who answered the questionnaire would not be representative of those attorneys who litigated the cases in the files studied. Even if there were differences in the two populations and some "skewing" was inevitable, we saw no impact on study results. The file study would produce an empirical reality, valid in itself regardless of any "fit" with the "perception of reality" captured by the questionnaire results. Also, the questionnaire was administered anonymously, meaning we could not compare information in the case file with questionnaire answers.

V. OBSERVATIONS and INTERVIEWS

We observed the Board at work in the summer months of 1985. When we had completed a first draft a year later, we forwarded it to Board Members and various attorneys who had substantial litigation experience at the Board. The Members and attorneys were interviewed in depth, and their reactions and observations are sprinkled throughout the report.

APPENDIX C. GAB CASE FILE DATA FORM

1. Case name ____________
2. Docket # ____________
3. Decision # ____________
4. Joint consideration ____________
5. Appellant ____________
6. Type grantee ____________
7. DHHS resp. ____________
8. Program name ____________
9. Law (title) ____________
10. Type decision appealed ____________
11. Total $ Appealed ____________
12. Amount settled ____________
13. Amt. Adjudicated ____________
14. Bd. members pres. ____________
    a. other ____________
    b. other ____________
15. Staff attorney ____________
16. HHS Attorney 1 ____________
    title ____________
    address ____________
17. HHS Attorney 2 ____________
    title ____________
    address ____________
18. HHS Attorney 3 ____________
    title ____________
    address ____________
19. HHS Attorney 4 ____________
    title ____________
    address ____________
20. HHS Non-lawyer rep. ____________
    title ____________
    address ____________
21. Grantee Atty. 1 ____________
    title ____________
    address ____________
22. Grantee Atty. 2 ____________
    title ____________
    address ____________
23. Grantee Atty. 3 ____________
    title ____________
    address ____________
24. Grantee Non-law. rep. ____________
    title ____________
    address ____________
25. Witnesses at hearing/conf.
    a. # for GE ____________
    b. # for DHHS ____________
26. Mediation Referral
    Yes ________ No ________
    a. date ____________
    b. date referred back ____________
    c. elapsed days ____________
    d. amount settled ____________
27. Summary disposition
    a. date ____________
    b. elapsed days ____________
    c. type:
        1. jurisdiction ____________
        2. appeal w/drawn ____________
        3. settlement ____________
        4. dismissal for non-pros./proced. ____________
        5. other ____________
28. Appeal
    a. type process ____________
        16.10 conference
        16.11 hearing
        16.12 expedited
        16.12 (d) special expedited
        16.0 hybrid conference
        16.00 written submissions
    b. type conference/hearing
        1. telephonic ____________
        2. in person ____________
29. # of pages
    a. appellants brief ____________
    b. respondents brief ____________
    c. appellants reply ____________
    d. supplemental briefs
        1. appellant ____________
        2. respondent ____________
    e. transcript
        1. N/A ____________
        2. telephonic tape ____________
        3. telephonic summary ____________
        4. verbatim in person ____________
    f. appeal file ____________
    g. supplemental appeal file ____________
    h. motions/memoranda
        1. appellant ____________
        2. respondent ____________
30. Dates
    a. final written decision ____________
    b. appeal filed ____________
    c. appeal received ____________
    d. appeal acknowledged ____________
    e. appellant's brief ____________
    f. respondent's brief ____________
    g. appellant's reply ____________
    h. first supp. appeal file ____________
    i. second supp. appeal file ____________
    j. third supp. appeal file ____________
    k. first supp. brief ____________
    l. second supp. brief ____________
    m. third supp. brief ____________
    n. first preliminary conference ____________
    o. second preliminary conference ____________
    p. conf./hearing ____________
    q. G.A.B. decision ____________
    r. post decision motion ____________

31. Board controls
a. Type______
b. Type______
c. Type______
d. Type______
e. Type______
f. Type______
g. Type______
h. Type______
i. Type______
j. Type______

Participatory requests
32. Type______
Party______
Denied______
Granted______
Withdrawn______
Agreement______
33. Type______
Party______
Denied______
Granted______
Withdrawn______
Agreement______
34. Type______
Party______
Denied______
Granted______
Withdrawn______
Agreement______
35. Type______
Party______
Denied______
Granted______
Withdrawn______
Agreement______
36. Type______
Party______
Denied______
Granted______
Withdrawn______
Agreement______

Time Extension
37. Appellant #1
a. Days Requested______
b. Granted______
c. Denied______
d. Days Granted______
e. Objected______
f. Unobjected______
38. Appellant #2
a. Days requested______
b. Granted______
c. Denied______
d. Days Granted______
e. Objected______
f. Unobjected______
39. Appellant #3
a. Days requested______
b. Granted______
c. Denied______
d. Days Granted______
e. Objected______
f. Unobjected______

40. Respondent #1
a. Days requested______
b. Granted______
c. Denied______
d. Days granted______
e. Objected______
f. Unobjected______
41. Respondent #2
a. Days requested______
b. Granted______
c. Denied______
d. Days granted______
e. Objected______
f. Unobjected______
42. Respondent #3
a. Days requested______
b. Granted______
c. Denied______
d. Days granted______
e. Objected______
f. Unobjected______
43. Stay #1
Requested by:
a. HHS______
b. GE______
c. Both______
d. Board______
e. # Days______
44. Stay #2
Requested by:
a. HHS______
b. GE______
c. Both______
d. Board______
e. # Days______
45. Disallowances
Amount______
(total)
For HHS______
For GE______
Split______
Settled______
Remand______
46. Amount______
(total)
For HHS______
For GE______
Split______
Settled______
Remand______
47. Amount______
(total)
For HHS______
For Ge______
Split______
Settled______
Remand______
48. Amount______
(total)
For HHS______
For GE______
Split______
Settled______
Remand______
49. Side disputes (Juris.:Procedure)
a. Type issue______
Raised by:
a. Apt.______
b. Resp.______
c. Board______
Motion/Brief - Pages
d. Apt.______
e. Resp.______
f. Date raised______
g. Date decided______

50. Type issue______
Raised by:
a. Apt.______
b. Resp.______
c. Board______
Motion/Brief - Pages
d. Apt.______
e. Resp.______
f. Date raised______
g. Days to decide______

51. Evidentiary Rulings: Appellant
a. Exclude______
Admit______
Ground______
Objected______
Unobjected______
b. Exclude______
Admit______
Ground______
Objected______
Unobjected______
c. Exclude______
Admit______
Ground______
Objected______
Unobjected______
d. Exclude______
Admit______
Ground______
Objected______
Unobjected______
e. Exclude______
Admit______
Ground______
Objected______
Unobjected______

52. Evidentiary Rulings: Respondent
a. Exclude______
Admit______
Ground______
Objected______
Unobjected______
b. Exclude______
Admit______
Ground______
Objected______
Unobjected______
c. Exclude______
Admit______
Ground______
Objected______
Unobjected______
d. Exclude______
Admit______
Ground______
Objected______
Unobjected______
e. Exclude______
Admit______
Ground______
Objected______
Unobjected______

APPENDIX D: GAB DOCKETS IN RESEARCH SAMPLE

81-172
81-175
81-178
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APPENDIX D (CONT.)

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84-221
84-224
84-227
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85-71
85-79

APPENDIX E. QUESTIONNAIRES AND COVER LETTERS

TEMPLE UNIVERSITY
A Commonwealth University
SCHOOL OF LAW
1719 N. Broad Street
Philadelphia, Pennsylvania 19122

October 24, 1985

Dear Counselor:

You may love it or you may hate it, but you are sure to have strong opinions about the Grant Appeals Board at the U.S. Department of Health and Human Services. The Board has some truly unique ways of managing cases, and the Administrative Conference of the United States has commissioned me to study the Board and report back on its efficiency and effectiveness.

You have litigated at least one case before the Grant Appeals Board and are in a position to stand up and be counted. Please take a few minutes to answer and return the enclosed questionnaire. Do it now! Don't throw it in "tomorrow's" stack.

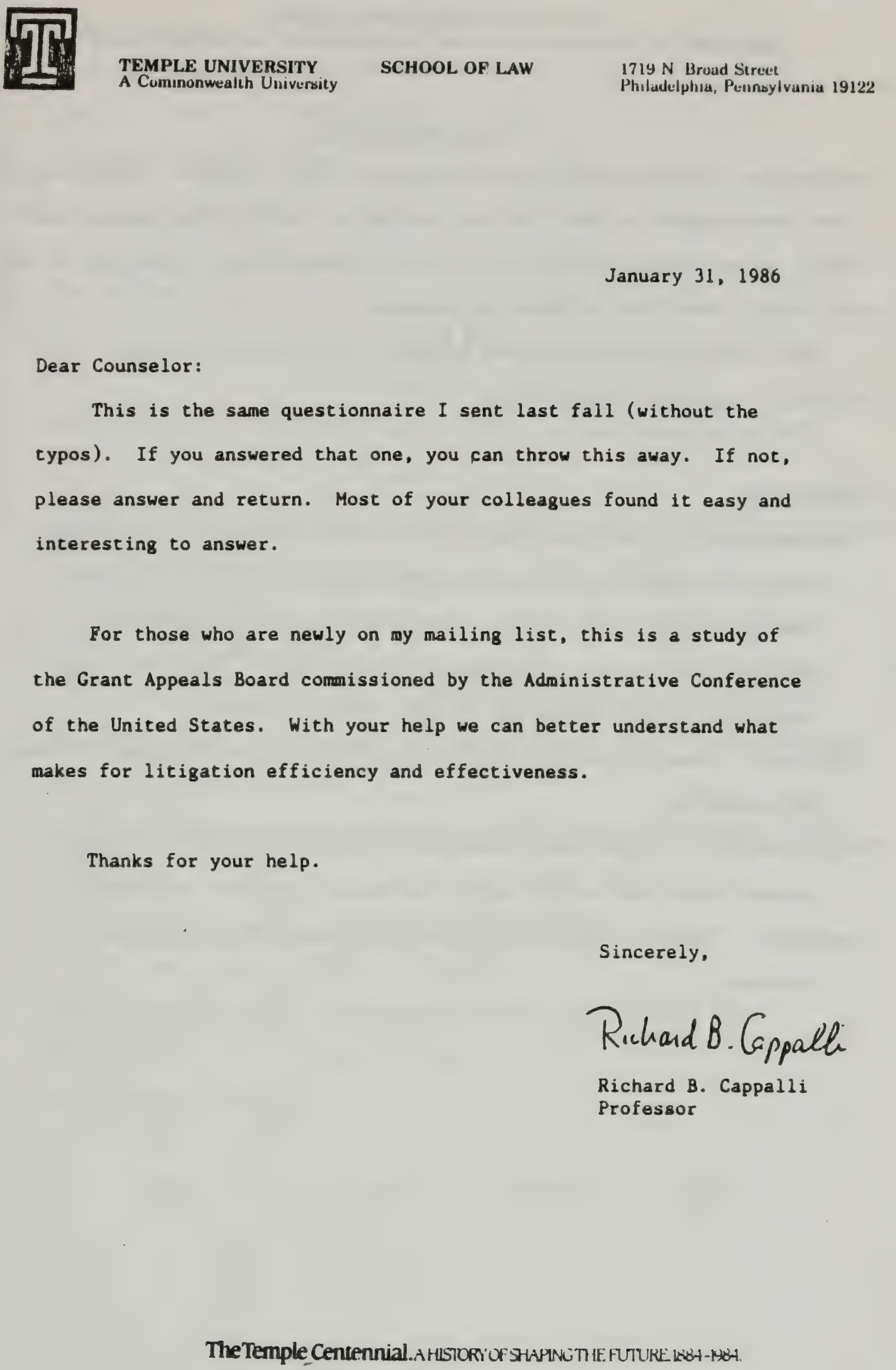
After three months of preliminary study, I presently have a high opinion of the Board's practices. It may, indeed, be a "national model" for court reform. Help me confirm my preliminary findings or tell me where I err.

Many thanks.

Sincerely,

Richard B. Cappalli
Richard B. Cappalli
Professor

RBC:jp
Enclosure



TEMPLE UNIVERSITY
A Commonwealth University

SCHOOL OF LAW

1719 N Broad Street
Philadelphia, Pennsylvania 19122

January 31, 1986

Dear Counselor:

This is the same questionnaire I sent last fall (without the typos). If you answered that one, you can throw this away. If not, please answer and return. Most of your colleagues found it easy and interesting to answer.

For those who are newly on my mailing list, this is a study of the Grant Appeals Board commissioned by the Administrative Conference of the United States. With your help we can better understand what makes for litigation efficiency and effectiveness.

Thanks for your help.

Sincerely,

Richard B. Cappalli

Richard B. Cappalli
Professor

The Temple Centennial. A HISTORY OF SHAPING THE FUTURE 1884-1984.

HHS Grant Appeals Board Study
Sponsored by the Administrative Conference of the United States

Attorney Questionnaire

Instructions. Circle or mark the answer which is most accurate in your mind. If you have appeared in more than one case before the HHS Grant Appeals Board ("GAB"), answer case-specific questions on the basis of your experience in the most recent closed case in which you appeared.

This questionnaire should take no more than 15 minutes to answer. Your cooperation is greatly appreciated.

Definitions

"Case management": Techniques used by Board members and staff to move cases along efficiently and to achieve correct results. Examples include orders to develop the record, orders that particular information or documents be provided, questions to clarify parties' legal and factual positions, and GAB formulation of the issues in dispute.

"Efficiency": Reaching and deciding an issue with minimum investment of time and resources.

"On the merits": If your case terminated on a jurisdictional or procedural ground, treat this as the "merits" and answer questions accordingly.

"Resources": Technical capability of party and amount thereof available for the case.

Questions

1. Year of your last closed case at GAB:

   1985 1984 1983 1982 1981

2. Case result for your party:

   1. Win ______
   2. Loss ______
   3. Split ______

3. You represented:

   1. United States ______
   2. Grantee ______

4. Please specify the number of cases in which you have appeared at GAB:

   1 2 3 4 5 6 or more

5. Please indicate the number of years you have been practicing law:

   1. 1-5 years ______
   2. 6-15 years ______
   3. 16 or more years ______

6. If you have been a government attorney representing federal, state or local government, please specify the approximate number of years you have practiced in that capacity: ________

7. Have you participated in a GAB conference or hearing on the merits (see definition)?

   1. yes ________ (Answer questions 8A-8H)
   2. no ________ (Skip to question 9)

8. Please evaluate the GAB conference or hearing on the merits (see definition) of the following criteria:

   A. clarity of issues

4	3	2	1
VERY GOOD	ADEQUATE	INADEQUATE	VERY POOR

B. legal representation of adversary

4	3	2	1
VERY GOOD	ADEQUATE	INADEQUATE	VERY POOR

C. completeness of fact presentation

4	3	2	1
VERY GOOD	ADEQUATE	INADEQUATE	VERY POOR

D. gaps in evidence

4	3	2	1
VERY INFREQUENT (or none)	INFREQUENT	FREQUENT	VERY FREQUENT

E. redundant evidence

4	3	2	1
VERY INFREQUENT (or none)	INFREQUENT	FREQUENT	VERY FREQUENT

F. surprise witness/document

4	3	2	1
VERY INFREQUENT (or none)	INFREQUENT	FREQUENT	VERY FREQUENT

G. judge's evidentiary rulings

4	3	2	1
VERY GOOD	ADEQUATE	INADEQUATE	VERY POOR

H. substitution of telephone for traditional in person hearing

4	3	2	1
VERY GOOD	ADEQUATE	INADEQUATE	VERY POOR

9. Please rate the GAB procedures as to their efficiency, which means reaching and deciding an issue with minimum investment of time and resources.

4	3	2	1
VERY GOOD	ADEQUATE	INADEQUATE	VERY POOR

10. Please evaluate the GAB procedures with respect to their conduciveness to sound decisions:

4	3	2	1
VERY GOOD	ADEQUATE	INADEQUATE	VERY POOR

11. Please rate the following aspects of GAB procedures:

A. notices

4	3	2	1
VERY FAIR	FAIR	UNFAIR	VERY UNFAIR

B. parties' opportunities to present facts

4	3	2	1
VERY FAIR	FAIR	UNFAIR	VERY UNFAIR

C. parties' opportunities to present law

4	3	2	1
VERY FAIR	FAIR	UNFAIR	VERY UNFAIR

D. joint consideration practice (if you have ever appeared in a jointly considered case)

5	4	3	2	1	N/A
STRONGLY APPROVE	APPROVE	NEUTRAL	DISAPPROVE	STRONGLY DISAPPROVE	DID NOT APPEAR IN SUCH CASE

E. opportunity for discovery

4	3	2	1
VERY FAIR	FAIR	UNFAIR	VERY UNFAIR

F. GAB deadlines

4	3	2	1
VERY FAIR	FAIR	UNFAIR	VERY UNFAIR

G. Board's evenhandedness in applying deadlines

4	3	2	1
VERY FAIR	FAIR	UNFAIR	VERY UNFAIR

H. If you answered the preceding question (11-G) with 1 or 2, please indicate which party received the more favorable treatment:

1. U.S.-respondent ___________
2. Grantee-appellant ___________

12. Please evaluate the presiding GAB judge in your case with respect to the following qualities:

A. competence

4	3	2	1
VERY GOOD	ADEQUATE	INADEQUATE	VERY POOR

B. impartiality

4	3	2	1
VERY GOOD	ADEQUATE	INADEQUATE	VERY POOR

C. deliberateness

4	3	2	1
VERY GOOD	ADEQUATE	INADEQUATE	VERY POOR

D. wise use of discretion

4	3	2	1
VERY GOOD	ADEQUATE	INADEQUATE	VERY POOR

13. A. Did the GAB presiding judge (directly or through the staff attorney) employ one or more "case management" techniques (see definitions) in your case?

1. yes _______ (Answer questions 13B, 13C, 13D)
2. no _______ (skip to question 14)
3. don't know _____ (skip to question 14)

B. Did the case management technique(s) make for a more efficient proceeding?

1. yes ______
2. no _______
3. don't know ______

C. Did the case management technique(s) help achieve a correct result on the merits (see definitions)?

1. yes ______
2. no ______
3. don't know ______

D. Please give your general opinion of this particular instance(s) of case management:

5	4	3	2	1
STRONGLY APPROVE	APPROVE	NEUTRAL	DISAPPROVE	STRONGLY DISAPPROVE

14. The procedures at GAB are distinguished by the large extent to which the GAB presiding judge may manage a case. See definition of "case management." Overall, what is your general opinion of this approach?

5	4	3	2	1
STRONGLY APPROVE	APPROVE	NEUTRAL	DISAPPROVE	STRONGLY DISAPPROVE

15. Overall, what is your general opinion of all the procedures (formal and informal, written and unwritten) employed at GAB?

5	4	3	2	1
STRONGLY APPROVE	APPROVE	NEUTRAL	DISAPPROVE	STRONGLY DISAPPROVE

16. Overall, to what extent do you feel that the final outcome of the case was fair to all involved?

4	3	2	1
VERY FAIR	FAIR	UNFAIR	VERY UNFAIR

17. To what extent did the GAB procedures provide you with an opportunity to present all of the evidence and arguments favoring your side of the case?

4	3	2	1
VERY GOOD	ADEQUATE	INADEQUATE	VERY POOR

18. The authority of GAB is not coextensive with that of a federal or state court. For example, GAB cannot invalidate a departmental regulation.

A. Please provide your opinion about such limits on GAB's authority:

5	4	3	2	1
STRONGLY APPROVE	APPROVE	NEUTRAL	DISAPPROVE	STRONGLY DISAPPROVE

B. Did the limits on GAB's authority produce an incorrect decision in the most recent closed case in which you appeared?

1. yes ______
2. no ______
3. possibly ______

C. Please describe changes in GAB's authority which you believe would improve its functioning:

1. ____________________
____
____
____
____

2. ____________________
____
____
____
____

3. ____________________
____
____
____
____

19. When GAB decides a case on the merits, it issues a written decision and opinion, in mimeographed form, which it may subsequently cite as a precedent. Please give your opinion about the accessibility of such GAB opinions.

4	3	2	1
VERY GOOD	ADEQUATE	INADEQUATE	VERY POOR

20. The following question compares the relative resources (see definitions) available to the U.S.-respondent with those available to the grantee-appellant in litigation at GAB.

A. Compared to the resources available to the U.S.-respondent, the grantee's resources were:

3	2	1
SUPERIOR	EQUAL	INFERIOR

B. Compared to the participatory opportunities available to the U.S.-respondent for the case, the grantee-appellant's opportunities were:

3	2	1
SUPERIOR	EQUAL	INFERIOR

21. A. Please evaluate the impartiality of GAB members and staff with respect to equal and impartial treatment of the parties appearing before it.

4	3	2	1
VERY IMPARTIAL	IMPARTIAL	PARTIAL	VERY PARTIAL

B. If you marked 1 or 2 above (Question 21A), indicate toward which side GAB members and staff demonstrated partiality:

1. U.S.-respondent _____
2. Grantee-appellant _____

22. A. Please evaluate the impartiality of GAB's procedures with respect to equal and impartial treatment of the parties appearing before it:

4	3	2	1
VERY IMPARTIAL	IMPARTIAL	PARTIAL	VERY PARTIAL

B. If you marked 1 or 2 above (Question 22A), indicate toward which side GAB's procedures are partial:

1. U.S.-respondent _____
2. Grantee-appellant _____

23. Please rate GAB procedures on a scale of 1 to 10.

VERY BAD									VERY GOOD
1	2	3	4	5	6	7	8	9	10

24. Please rate GAB judges on a scale of 1 to 10.

VERY BAD									VERY GOOD
1	2	3	4	5	6	7	8	9	10

25. Please rate GAB staff attorneys on a scale of 1 to 10.

VERY BAD									VERY GOOD
1	2	3	4	5	6	7	8	9	10

26. If you have had significant state court experience, please rate state court procedures on a scale of 1 tp 10.

VERY BAD									VERY GOOD
1	2	3	4	5	6	7	8	9	10

27. If you have had significant federal court experience, please rate federal court procedures on a scale of 1 to 10.

VERY BAD									VERY GOOD
1	2	3	4	5	6	7	8	9	10

28. Comments on GAB:

29. Comments on this questionnaire:

Thank you for your cooperation.

RC/db/5

APPENDIX F: STANDARDS FOR GAB MEMBERS' PERFORMANCE

JOB ELEMENT #1 (CRITICAL)

A Board Member produces written work that addresses issues, facts, and law and revises such work in accordance with comments. The Board produces final written work through a process of dialogue; a draft of a piece of work is acceptable if it reflects a reasonable approach, even though the approach is not the one ultimately adopted.

Performance Standard A

A Board Member demonstrates in his/her work an ability to be clear, concise, well-reasoned and organized. This ability is demonstrated if (1) other Board members believe that no changes are necessary to correct poor organization of a major nature or failure to logically develop a major point; (2) the work does not show a pattern of carelessness in style and editing requiring corrections for spelling, grammar, or citation errors; (3) the Board Members revises such work effectively in accordance with clear directions.

The nature and difficulty of the work, the grade level of the individual, and the time allotted for producing the work will be taken into account when evaluating the employee's performance. Successive drafts of one document will not be rated separately unless a decision is made to change the approach or result in such a way that more than minor revisions are required.

Level 0 - Failed to Meet- Less than 75% of the written work meets the standard.

Level 1 - Partially Met - 75% of the written work meets the standard.

Level 2 - Fully Met - 90% of the written work meets the standard.

Level 3 - Exceeded - Board Member meets the standard 100% of the time and in 80% of the cases, work needs no organization changes, all points are logically developed, and no necessary editing for other than minor points needs to be done.

Level 4 - Substantially Exceeded - Board Member meets the standard 100% of the time and in 90% of the cases, work needs no organization changes, all points are logically developed, and no necessary editing for other than minor points needs to be done.

Performance Standard B

A Board Member's research and analysis (1) identifies issues; (2) makes findings of fact, thoroughly considering the evidence in the record and according it the proper weight; and (3) analyzes and resolves issues in a well-reasoned way, considering the constitutional, statutory, regulatory provisions, and case law, applicable Departmental policy and precedent, and Grant Appeals Board precedent.

Level 0 - Failed to Meet - A Board Member's work frequently fails to identify material issues, or meets the rest of the standard in less than 70% of the written work.

Level 1 - Partially Met - A Board Member's work almost always identifies all material issues, or meets the rest of the standard in 70% of the written work.

Level 2 - Fully Met - A Board Member's written work always identifies all material issues, and meets the rest of the standard in at least 80% of the written work.

Level 3 - Exceeded - A Board Member's written work always identifies all material issues, and meets the rest of the standard in at least 90% of the written work.

Level 4 - Substantially Exceeded - A Board Member's written work always identifies all material issues, and meets the rest of the standard in at least 95% of the written work.

Performance Standard C

A Board Member closes cases within 30 days of the last action in the case, except in circumstances beyond the Board Member's control. Exceptional circumstances include the Board Member's caseload, excused absences within the critical period, the nature and difficulty of the work, clerical constraints, unreasonable delays caused by other Board members, failure of the Board members to reach consensus. The Board Member's failure to submit work for review within a time which reasonably allows the case to be closed within 30 days is not considered an exceptional circumstance. Exceptional circumstances also do not include situations which could have been avoided if the Board Member had brought the situation to the attention of the Board Chair in advance. All exceptions must be justified in writing, to the Board Chair's satisfaction.

Level 0 - Failed to Meet - Less than 65% of cases are closed within 30 days of last action in case, or one or more cases is not closed within 60 days of the last action in the case.

Level 1 - Partially Met - At least 65% of cases closed within 30 days of last action in case, and the remainder are closed within 60 days.

Level 2 - Fully Met - At least 75% of cases closed within 30 days of last action in case, and the remainder are closed within 60 days.

Level 3 - Exceeded - At least 90% of cases are closed within 30 days of last action in case and the remainder are closed within 45 days.

Level 4 - Substantially Exceeded - All cases closed within 30 days of last action in case.

JOB ELEMENT #2 (CRITICAL)

A Board Member conducts hearings and conferences (including telephone conferences).

Performance Standard

A Board Member conducts hearings and conferences (including telephone conferences) efficiently and effectively by keeping good order; interacting with the parties and witnesses tactfully; assuring development of a sound transcript; assuring that the parties address all matters necessary to complete and fair resolution; keeping to a minimum redundant, irrrelevant, and immaterial testimony and arguments; and assuring that the parties have no valid complaints about procedural fairness.

Level 0 - Failed to Meet - Performance does not meet the standard at least 75% of the time.

Level 1 - Partially Met - Performance meets the standard 76 - 89% of the time.

Level 2 - Fully Met - Performance meets the standard 90 - 100% of the time.

Level 3 - Exceeded - Board Member meets Level 2, and there is evidence that in two or more hearings or conferences, a Board Member successfully handles complex evidentiary matters, difficult parties or witnesses, or other matters requiring some sensitive and tactful handling with little advance preparation.

Level 4 - Substantially Exceeded - Board Member meets Level 2, and there is evidence that in two or more hearings or conferences, a Board Member successfully handles unusually complex evidentiary matters, acrimonious or recalcitrant parties or witnesses, or other matters requiring sensitive and tactful handling with little advance preparation.

JOB ELEMENT #3 (CRITICAL)

A Board Member reviews the draft written work of staff, supervisory attorneys and other Board Members and provides suggestions, comments, and criticism as needed, to assure that Board work prodcuts are of the highest quality. A Board Member returns drafts promptly and within time to meet established deadlines and goals.

Performance Standard

A Board Member's critique and comments on draft written work are constructive and are communicated clearly. They are precise, concise, informative, and useful, and are given in a tactful manner. Drafts are returned promptly and within time to meet established deadlines and goals.

Level 0 - Failed to Meet - Oversight does not meet the standard at least 75% of the time.

Level 1 - Partially Met - Oversight meets the standard 76 - 89% of the time.

Level 2 - Fully Met - Oversight meets the standard 90 - 100% of the time.

Level 3 - Exceeded - Board Member meets Level 2 standard, and written decisions overseen primarily by a Board Member thereafter frequently require no further substantial revision by the Board Chair and other Board Members.

Level 4 - Substantially Exceeded - Board Member meets the Level 2 standard, and decisions overseen primarily by a Board Member thereafter usually require no further substantial revision by the Board Chair and other Board Members.

JOB ELEMENT #4 (CRITICAL)

A Board Member takes steps to process cases, such as reporting on status of cases, preparing correspondence in cases, and identifying areas of a case which need to be developed.

Performance Standard

A Board Member provides timely information to the Board Chair on case status; monitors cases to ensure that the need for further developing a record is identified as soon as possible; prepares correspondence or takes other actions necessary to prevent undue delay in a case; and proposes alternative solutions to procedural problems.

The levels below are determined by a system of pluses and minuses, which can offset each other. A minus is given for actions such as failure to report or provide advice in a timely manner and failure to identify need for developing a record or need for action to prevent delay when need was clear. A plus is given for actions such as suggesting creative procedural alternatives, identifying problem areas at an early stage of a case where this took careful analysis, accepting a particularly heavy caseload.

Level 0 - Failed to Meet - A Board Member has an overall tally of less than -3.

Level 1 - Partially Met - A Board Member has an overall tally of between -1 and -3.

Level 2 - Fully Met - A Board Member has an overall tally of 0.

Level 3 - Exceeded - A Board Member has no minuses and receives a plus in at least 20% of the cases.

Level 4 - Substantially Exceeded - A Board Member has no minuses and receives a plus in at least 30% of the cases.

JOB ELEMENT #5 (NON-CRITICAL)

A Board Member works in a professional manner.

Performance Standard

A Board Member (1) communicates with other Board members, colleagues, and Board Chair an articulate, tactful, sensitive, and cooperative manner; (2) volunteers to undertake new and varied assignments and duties when current workload permits; (3) shows an interest in new developments in related areas of the law; (4) participates in training or learning opportunities on a regular basis; (5) is responsive to guidance, instruction, advice, and constructive criticism; (6) consults with Board Chair about caseload management in order to avoid backlog.

Level 0 - Failed to Meet - A Board Member meets less than three of the components.

Level 1 - Partially Met - A Board Member meets three of the components.

Level 2 - Fully Met - A Board Member meets (1) and (5) and two other components.

Level 3 - Exceeded - A Board Member meets (1) and (5) and three other components.

Level 4 - Substantially Exceeded - A Board Member meets all of the components.

JOB ELEMENT #6 (NON-CRITICAL)

A Board Member complies with administrative procedures, systems, and requirements imposed by his/her supervisor and with the established policy of the Board, such as filling out leave slips, providing statistical information, responding to need for action in court cases reviewing Board decisions, and providing information for litigation status report.

Performance Standard

A Board Member carries out administrative responsibilities in a timely, accurate, and complete manner.

Level 0 - Failed to Meet - A Board Member fails to meet the standard.

Level 1 - Partially Met - A Board Member occasionally meets the standard.

Level 2 - Fully Met - A Board Member generally meets the standard.

Level 3 - Exceeded - A Board Member almost always meets the standard.

Level 4 - Substantially Exceeded - A Board Member always meets the standard.

BACKGROUND REPORT FOR RECOMMENDATION 86-7

AGENCY TIME LIMITS AS A TOOL FOR REDUCING REGULATORY DELAY

Charles Pou, Jr.
and
Charlotte Jones

Report to the Administrative Conference of the United States

AGENCY TIME LIMITS AS A TOOL FOR REDUCING REGULATORY DELAY

The problem of delay in federal agency decisionmaking has become a major source of complaint, receiving considerable congressional and academic attention in recent years. The Senate Governmental Affairs Committee's 1977 six-part study on federal regulation devoted one volume to the topic,[1] and, along with several "regulatory reform" bills, would have required all agencies to establish time limits for certain actions and report on their progress in enforcing them. Hundreds of proceedings already operate under statutory time limits, and agencies have paid millions to consultants for purposes of reducing delay. The Administrative Conference of the United States, charged with advising agencies and Congress on ways to improve the administrative process, has spoken to the problem several times, as have the American Bar Association and numerous others.[2] While myriad aspects of the problem have been examined, and all manner of "solutions" tried or proposed, relatively little attention has been given to examining in detail agencies' successful actions against delay,[3] or to considering if these cases hold lessons for other agencies plagued by slow decisionmaking.

1/ Delay in the Regulatory Process, 95th Congress, 1st Session (1977). Delay problems have has been studied also in particular agencies, like the Federal Energy Regulatory Commission ("FERC") and the Federal Trade Commission. E.g. Report of the ABA Task Force Studying the Federal Trade Commission (1969); General Accounting Office, Additional Management Improvements Are Needed to Speed Case Processing At the Federal Energy Regulatory Commission (July 15, 1980); see also, Bermann, Administrative Delay and Its Control, Law in the U.S. for the 1980's 473 (1982).

2/ Administrative Conference Recommendations 82-2 (Resolving Disputes under Federal Grants); 78-3 (Time Limits on Agency Action); 78-1 (Reduction of Delay in Ratemaking Cases); 78-2 (Procedures for Determining Social Security Disability Claims); 73-3 (Quality Assurance Systems in the Adjudication of Claims of Entitlement to Benefits or Compensation). 1 C.F.R. §305 (1983). These are discussed below, as are the recommendations of the Committee, ABA committees, GAO and others. See also Ogden, Reducing Administrative Delay: Timeliness Standards, Judicial Review of Agency Procedure, Procedural Reform and Legislative Oversight, 4 Dayton L. Rev. 71 (1979), for a more detailed summary of some of these groups' views.

3/ There have been a few such inquiries, like Thomas Morgan's "Toward a Revised Strategy of Ratemaking," 1978 Reports and Recommendations of the Administrative Conference 23 (1980) ("ACUS"), 78 U. Illinois L.F. 21 (1978), and sections of the Senate Committee on Governmental Affairs report, supra note 1 at 133-140.

I. BACKGROUND THOUGHTS ON DELAY

Delay, which is simply an agency's failure to initiate or conclude action on a timely basis,[3a] harms regulated entities because it is expensive, heightens their uncertainty, costs business opportunities, discourages innovation, renders data for decision stale, and is wasteful. Its deleterious impact on agency morale and on the public at large, while less measurable, is significant. Countering these manifold burdens, of course, are factors like the need for accurate decisionmaking and effective use of agency resources. This paper is premised on the view that well-informed agency officials, who in most instances are charged with weighing these considerations and deploying agency resources accordingly, are the ones who ultimately are most apt to make inroads on delay. Based on a review of several successful agencies' experiences, we seek to help agency officials to undertake certain recommended internal measures to ameliorate the problem, including use of self-imposed time limits at all agency levels.

Other potential sources of improvement — Congress and the courts — are not located where they can deal effectively with delay. The numerous legislated deadlines for agency licensing, rulemaking and adjudication have had quite limited success, to the point where the Administrative Conference of the United States has recommended that Congress ordinarily not use them.[4] Statutory deadlines fail to address many fundamental causes of delay, often are rigid or unrealistic, and tend to undermine an agencies' ability to establish priorities and control the course of its proceedings. They may foreclose the use of procedural techniques valuable to enhancing participation and obtaining information.[5] Courts have had difficulty when faced with enforcing these time limits, since Congress often fails to specify their legal effect. In cases where courts have imposed their own deadlines, the remedy has suffered from many of the same troubles.[6]

Slow decisionmaking cannot simply be legislated away or handled via any other single approach. Giving an agency new personnel sometimes may be merited when caseloads rise dramatically, but is usually impractical or undesirable. At its most elemental, ameliorating delay requires imbuing agency officials and employees with skills and habits that place more emphasis on timely decisionmaking. As the Senate Governmental Affairs Committee recognized, agency personnel — particularly higher level officials — must examine regularly their own agency's difficulties, and take steps that will, over time, allow the agency to do its business efficiently. Agencies may, for example, promulgate general rules that decide in advance certain issues or categories of cases likely to recur.[7] Officials may streamline procedures by delegating authority to make decisions, removing or consolidating layers of review, or eliminating other steps in the process. They may hire management specialists and seek to improve their planning and oversight, or implement settlement policies to encourage parties to compromise. In addition to these changes, the Senate Governmental Affairs Committee and others have suggested appointing agency heads who are sensitive about delay problems, developing streamlined procedures for some cases, and creating an APA requirement that agencies set their own time limits for general classes of proceedings.[8]

[3a] Bermann, supra note 1 at 474.

[4] Professor Edward Tomlinson's Report on the Experience of Various Agencies with Statutory Time Limits Applicable to Licensing a Clearance Function and to Rulemaking, 1978 Reports and Recommendations of the Administrative Conference 119 (1978), amply demonstrates the difficulties with these limits.

[5] See Administrative Conference Recommendation 78-3, Time Limits on Agency Action, 1 C.F.R. §305.78-3 (1983).

[6] See, Tomlinson, Report on the Experience of Various Agencies with Statutory Time Limits Applicable to Licensing a Clearance Function and to Rulemaking, supra note 4; Ogden, Reducing Administrative Delay: Timeliness Standards, Judicial Review of Agency Procedure, Procedural Reform, and Legislative Oversight, 4 Dayton L. Rev. 71 (1979); Judicial Control of Administrative Delay, 3 Dayton 345 (1978).

Given that the reasons for delay range from growing caseloads with increasingly sophisticated litigants to complex cases requiring hard decisions, from statutorily-imposed procedures to stalling and occasionally even sloth, none of these remedies is likely to succeed alone. Even taken together, they may not work smoothly at first and will succeed only if agency managers oversee their use conscientiously.

Virtually all of those who have examined the problem agree that potentially one of the most effective tools to ensure that officials and employees recognize timeliness' importance has been an internal system of monitored time guidelines. Compared to solutions involving generic rulemaking, reorganization and settlement policies, agency use of time limits is far less inextricably bound up with hard questions of law, policy and even politics. And while hardly a panacea for every cause of delay, time limits can work to inculcate awareness of the importance of time, alert managers to bottlenecks as they occur, and help keep routine items moving. For these reasons agency successes in reducing delay with time limits should be more readily replicated by others than approaches to reducing delay that are more agency-specific and substantive. As opposed to statutory or court-imposed deadlines, agency-level limits are flexible, can be more readily tailored to suit different kinds of proceedings, and are less likely to provoke judicial intervention. The Administrative Conference of the United States, even while opposing legislatively imposed deadlines, has called on agencies to develop internal time limits for all of their rulemakings and adjudications.[9] This recommendation was seconded by the ABA's Committee on Law and the Economy in 1979, which went even further and called for requirements that agencies establish and enforce deadlines.[10]

While time limits have been widely prescribed, practical advice on implementing them (and other techniques to reduce delay) has been hard to come by. The Governmental Affairs Committee Report, in examining the roles of agency management and planning in reducing delay, contains an instructive look at agency case handling procedures.[11] Like GAO's report on case processing at FERC, it identifies key areas for

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7/ Several sources have recommended use of rules, including the Senate Governmental Affairs Committee, GAO, and the Administrative Conference. Supra, notes 1 and 2.

8/ Delay in the Regulatory Process xvii-xxii (1977).

9/ See Conference Recommendations 78-3 (Agencies should impose their own time limits on rulemakings and adjudications); 82-2 (There should be internal deadlines for resolving disputes under grant programs), 1 C.F.R. §305 (1983).

10/ Federal Regulation: Roads to Reform 101,103 (1979); See also, GAO report, supra note 1.

11/ Delay in the Regulatory Process 133-140 (1977).

improvement. Conference Recommendation 73-3, which drew on a study by Professor Jerry Mashaw, stated,

> Positive caseload management should be recognized as essential to the accurate, timely and fair adjudication of claims of entitlement to benefits or compensation. A positive caseload management system should include three connected operations: (1) the development of standards and methods for measuring the accuracy, timeliness and fairness of agency adjudications; (2) the continuous evaluation of agency adjudications through the application of those standards and methods; and (3) the use of the information gathered in the course of such evaluation to identify needed improvements in adjudicative performance.

The Conference called on agencies to implement statistical reporting systems that will indicate the accuracy, timeliness and fairness of claims processing and identify "the management unit or, where appropriate, the individual adjudicator involved in order that effective action may be taken to reinforce success and to improve performance".[12] But aside from such general advice, there has been little systematic examination of how specific agencies can, or should, use case monitoring systems, generic rulemaking, streamlined hearings, or other procedures.

Seeking to begin filling this gap, we assess processes for combatting delay at four federal agencies (including some that have exhibited notable long-term success) in hopes of serving as a source of principles and information for others. We examine case monitoring techniques used by the Civil Aeronautics Board ("CAB"), the Office of the General Counsel at the National Labor Relations Board ("NLRB"), the Federal Trade Commission ("FTC"), and the Departmental Grant Appeals Board at the Department of Health and Human Services ("HHS") to expedite decisions in rulemaking proceedings, formal adjudications or informal proceedings. Some are simple methods that can be implemented if one agency official takes the time to formulate time guidelines and enforce them intelligently. Others are complex, involving comprehensive computer case tracking and reporting systems. Some operate mainly within higher echelons, like the FTC's policies for expediting Commission decisions; others cover all workers involved, from investigators to ALJs to top officials. Our observations suggest that agency-imposed time limits are not a cure-all, but, where systematically monitored and enforced, they have markedly increased efficiency and reduced delay.

II. RECOMMENDATIONS TO AGENCIES

Promulgating time limits to aid in reducing delay, should be only a first step, the catalyst for additional related agency actions. It should not be considered an end in itself, but rather as a management device supported by other internal components that help cultivate time-conscious work habits. Otherwise, deadlines may serve as a temporary palliative to avert congressional action, or provide the public with the legal means to prevent agency action egregiously delayed, but they are not likely to cure the problem alone.

12/ Recommendation 73-3 (Quality Assurance Systems in the Adjudication of Claims of Entitlement to Benefits or Compensation), 1 C.F.R. §305.73-3, 3 ACUS 160 (1974).

As is revealed in the following analyses of the four federal agencies, innovations to reduce delay can sap precious resources such as time, human effort, and money. Without this allocation of resources, success is unlikely. Internal agency time limit systems require an initial investment of time to accumulate data and set limits for various kinds of cases. Once the limits are in place, an agency must make sure that they are monitored and enforced by the proper employees.

This study suggests that the implementation of time limits at the CAB and NLRB has worked quite well in the long run to lessen delay while the HHS Grant Appeals Board has reduced its backlog considerably. An added advantage to these agencies is that their case monitoring systems record rough evidence of their productivity. This can help agency managers evaluate some personnel, and can be a useful tool during the budget authorization process. Though hard evidence is scarce, many agency officials believe that these systems pay for themselves.[13]

Necessary Components for Reducing Delay

Each successful program had four constant factors. These were (1) a program of interim step-by-step time guidelines, (2) agency regulations complementing the informal internal timetables, (3) a monitoring system that pinpointed problem areas or cases, and (4) a management committed to expeditious processing. Agency variances in personnel and other resources, caseload, complexity of cases, applicable procedures, and missions are too great for one particular system to be effective for all, but these four components appear basic.[14]

First, a time-limit system that has step-by-step interim time targets, such as the "Pipeline" structure at the NLRB, appears to produce the best results. The idea is simple, but implementing it often can be a complicated process, and the agency should seek to involve decisional officials and other employees and persons with expertise to help in developing targets. The time limits, in the form of specific informal guidelines, should serve to move the case constantly through each step of the proceeding in a timely, predictable manner. They should be fixed in all cases for all decisional levels within the agency, from investigation to initial decision to final agency review. The guidelines should be flexible enough to encompass exceptional cases, though firm enough to ensure that any delays are reasonable and justified. This approach should force each employee or office involved in a case to set a time schedule, resulting in more efficient time allotment at each step. At the least, it should keep routine items moving and draw attention to delays.

An added advantage to fixed timetables for each stage is predictability. If deadlines are used, and if they are common knowledge, " . . . then as the deadline time approaches, people in the organization will know what others are probably doing and can make reasonably valid inferences about what they themselves should be doing. . ."[15]

13/ Interviews with Joseph DeSio, Associate Director, Office of General Counsel, NLRB; John Settle, Chair, HHS Departmental Grant Appeals Board; Norbert Kaus, CAB.

14/ A somewhat similar prescription was set forth briefly by the ABA Committee studying the FTC in the late 1960's, supra note 1, which stated that continuing supervision should be exercised over agency proceedings, deadlines should be established, and some group should cause these deadlines to be met.

(cont'd)

Thus, when a case or decision is handled within a predictable duration, it is easier for an agency to organize its own internal work schedule to match the work flow.

Second, time limits actually promulgated as agency rules should be broad guidelines reflecting only the overall time targets for the main stages of the proceeding. They should not be rigid specifications for each minute interval. Formally announced time limits that are too detailed can inhibit the positive effect of rules because inflexible and hard to adjust to the needs of a complex case or changing caseload. Most agencies need the flexibility to fine-tune when problems occur without dealing with a lengthy rulemaking process.

Moreover, the public interest is best protected when the rules are not so binding that speed becomes more important than reason and fairness. Thus, each agency we reviewed treated its rules as general guidelines, not absolutes. When an unusual case entered the docket room, it could be tagged and treated according to its particular circumstances.

Third, no system is complete without a monitoring capacity to measure how the time objectives set by the agency are being met. At the CAB, the managers handle problems as they arise within each division, and the Chief of Minutes handles agency-wide problems. At HHS' Grant Appeals Board, the Chair double-checks each overage case. At the NLRB, regional directors maintain a surveillance of problem areas highlighted by monthly case reports to the Office of the General Counsel. Without this oversight, which alerts managers who can then make sure that there is a valid reason for delay, the rules have little meaning.

Each of these agencies has adopted a monitoring system that fits its own situation. While an overly rigid operation can be counter-productive and even inhibit thoughtful decision, a lax approach that permits repeated delays to occur without any penalty will have little impact. The CAB's struggle to find a balance can serve as one example of an appropriate solution to the problem. Briefly, the CAB's initial method of requiring that time extensions be granted by the Board itself was altered to enable middle managers, instead of the Board, to change target dates if a justifiable explanation were given. Now, the explanation is recorded in the case file, which is reviewed regularly. As a result, the system is more flexible and much less threatening to staff members, yet still discourages delay.

Finally, the commitment of those who are in charge of implementing time limits is crucial. Agencies have great difficulty instituting an effective caseload management system unless key agency officials are willing to accept long-term responsibility for enforcing time limits. Although this seems an obvious point, it is worth examining. At each successful agency the system was implemented by capable people committed to reducing delay and backlog. Their commitment may have been fostered by psychological motives or external incentives ranging from merit awards to productivity requirements stated explicitly in their Senior Executive Service or other agreements. Whatever the motivation, there must be one or more responsible employees willing, able and authorized to devote the time and energy needed to develop flexible, yet clear, objectives designed to achieve the overall target date; monitor cases consistently; and deal promptly and effectively with delays that do occur.

15/ Francis D. Tuggle and Charles B. Saunders, "Control and Its Organizational Manifestations," 14 Review of Business and Economic Research, 1, 11, 12 (1979).

Agencies should consider using available tools to ensure that their officials — and especially key employees charged with reducing delay — are properly motivated. These tools might include employee job descriptions and, where available, periodic performance evaluations. NLRB regional directors and the Chair of HHS' Departmental Grant Appeals Board, for instance, have specific obligations written into their SES contracts concerning responsibility to reduce delay and ensure timely case handling. Timeliness considerations have been written into some adjudicative officers' job descriptions or merit pay criteria — an approach agencies should consider. If more senior executives and employees worked under such criteria many agencies would become far more committed to promptly resolving their cases. Another tack — imposing limits on high level agency officials — has been tried by the FTC, and may serve as an example for others in the agency.

Implementation Problems

Two major problems faced most of the agencies that developed time limits. One was the immense amount of time and patience frequently required to create a successful system. The other was the need to overcome negative employee attitudes.

At each agency, and particularly at the CAB, some staff members resisted changes that altered existing work habits. After initial transition periods, ranging from less than six months at HHS to 18 months at the CAB, much of this resistance dwindled. Moreover, at the outset, each successful agency had to invest time and manpower resources to create appropriate formal and informal timetables. This process can be tedious and frustrating. First, it can entail gathering information from offices and bureaus within the agency pertaining to the nature of their various proceedings and the time and resources spent on case processing within each office. Next, the data must be analyzed to break down the patterns of common case proceedings and fix appropriately expeditious time frames for each interim step.

The amount of time invested and the procedures used to accumulate and compile the information varied. At the CAB two computer specialists needed eighteen months to collect data, and six additional months to analyze it. The process was lengthy because so much of the pertinent information was undocumented. In contrast, the NLRB's team of lawyers and managers used an existing time study of case handling within the Office of the General Counsel to set up a structure of interim case stages and applicable time goals in slightly less than a year. The HHS Grant Appeals Board's system simply calls for cases handled under an expedited procedure to be completed in three months, cases with no hearings needed in six months, and cases with hearings in nine months.

Obviously, the more diverse an agency's caseload the more difficult it will be to develop appropriate time frames at the outset. But, as evidenced by both the CAB and HHS Departmental Grant Appeals Board, after the initial overhaul fine-tuning the system as new cases enter it can be done rapidly and efficiently. At the CAB, for example, when an unusually complex work item enters the docket room, it is labelled a "special case" and a manager and responsible staff members meet briefly to establish an appropriate time schedule and step sequence. In this manner, conscientious agency management can employ time limits flexibility in a variety of cases.

Another important barrier affecting time-monitoring systems is the dollar investment required. This need not be a drawback, since agencies can choose from a wide range of approaches that vary according to the size, function and complexity of the system. A smaller agency may wish to keep costs at a minimum, and keep track of time limits manually. If so, the cost should not impede an agency's decision to establish time limits. On the other hand, an agency with a substantial caseload may wish to develop a fully automated program that covers every proceeding, even though a computerized information tracking system is a significant investment. Agency costs will vary according to their size, organization and functions and the number and complexity of their proceedings.

The case studies herein suggest that a committed agency can invest a minimal amount of funds and still reduce delay; or it can do more and to create a fully automated system to help manage an unwieldy caseload. Initially, the NLRB's information system was monitored manually, and was quite effective. Now, the NLRB is switching to a computer system because it appears to be economically feasible. While a computerized time limit system has real benefits, as discussed in the report on the CAB, some agencies may not find it necessary. Fortunately, organizations need not decide between a costly system and none at all.

III. AGENCY AUTHORITY TO IMPOSE LIMITS

Before examining specific agencies, it will be useful to consider briefly the legal context within which federal agencies operate, particularly the extent of their authority to impose decisional deadlines for various agency personnel.

There appear to be few legal impediments to placing timeliness or backlog considerations into high level officials' Senior Executive Service agreements. A few agencies, like HHS, already have done this in some cases. Even commissioners of regulatory agencies can be bound if deadlines are adopted officially. Most employees can be dismissed "for the efficiency of the service," which includes failure to meet performance standards and a variety of other situations. Since the APA mandates timely decisions, agencies surely can use promptness as a criterion for supervising and assessing their personnel. Unless a collective bargaining or other agreement provides otherwise, imposition of case handling standards appears allowable with most employees.

One group of employees, however, occupies a unique position within an agency; the relationship between many agencies and the administrative law judges ("ALJs") they employ has been a thorny one.[16] While some agencies routinely impose limits on all personnel, and incorporate ALJ decision time into these timeliness objectives, other agencies' assertions of authority to use decision quotas, time limits, or similar devices with ALJs has aroused considerable controversy. Emotions have been quite intense at the Social Security Administration, where the ALJs have twice sued to block efforts to regulate their productivity. In 1978, following the first challenge, SSA and its ALJs entered into a consent agreement prohibiting use of numerical quotas or goals. Imminent court decisions in litigation now pending over SSA's recent attempts to dismiss four ALJs for inadequate productivity may help settle the uncertainty in this area.[17]

16/ See e.g., Professor Victor Rosenblum's report to the Administrative Conference, Contexts and Contents of "For Good Cause" as Criterion for Removal of Administrative Law Judges: Legal and Policy Factors, 6 Western N. E. L. Rev. 593 (1984); Scalia, The ALJ Fiasco, A Reprise, 47 U. Chi. L. Rev. 57 (1979).

17/ E.g., SSA v. Robert W. Goodman, Docket No. HQ 7521821001, MSPB. At present, an ALJ at the Merit Systems Protection Board has ruled in favor of SSA; his decision is being appealed to the Board. See Rosenblum, supra note 16, for a fuller discussion.

Until now, the courts have not had to face the question of an agency's right to discipline an ALJ for failure to produce. In Ramspeck v. Federal Trial Examiners' Conference,[18] the Supreme Court appeared to reject the notions that ALJs (then "trial examiners") were totally independent of their agencies or "very nearly the equivalent of judges" in tenure. It viewed ALJs' status as intended to prevent "devious practice" by an agency detrimental to an ALJ's integrity or impartiality. Upholding an MSPB decision against an ALJ, the U.S. District Court for the District of Columbia stated that an ALJ "is not immune from review for procedural misconduct, incompetence or other failings in the performance of his or her duties."[19] A Seventh Circuit decision has described ALJs as having a "qualified right of decisional independence."[20]

Questions as to the ALJ's role pose difficult problems for administrators. On the one hand, Congress, wishing to insulate them from some kinds of agency pressure as to decisions, has created a unique system for selecting ALJs, prohibited certain kinds of communications with ALJs, protected them from performance evaluations by their agencies, and provided several other safeguards. Unlike federal employees, who can be fired "for the efficiency of the service", ALJs can be disciplined only "for good cause,"[21] which appears to be a higher standard.[22] In addition, Congress has authorized ALJs to "regulate the course of [an agency] hearing";[23] it might be argued that agency attempts to impose time limits usurps this power.

On the other hand, the ALJs' special status does not render them immune to discipline or dismissal. Authoritative decisions have allowed judicial sanctions for a variety of derelictions,[24] and, if productivity standards cannot be enforced, an indolent ALJ might do nothing (or little) and remain immune to discipline. As Professor Rosenblum found, precedent exists for disciplining even court judges who fail to keep up with their work.[25] Also, if agencies cannot amend their productivity expectations to meet rising caseloads, especially when providing additional services (e.g., word processing, law clerks, technical advice, training seminars) to increase employee output, then the only alternatives to backlog would be to dismiss cases wholesale, have agency jurisdiction altered or hire additional ALJs and support personnel. None of these are

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18/ 345 U.S. 128 (1953).

19/ Chocallo v. Prokop, No. 80-1053, slip op. at 3 (Oct. 10, 1980).

20/ D'Amico v. Schweiker, 698 F.2d 903 (1983).

21/ The full standard reads, "Any action may be taken aginst an administrative law judge appointed under section 3105 of this title by an agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board." 5 U.S.C. 7521(a).

22/ But see Rosenblum, supra note 16, which suggests that recent MSPB decisions may have confused the two standards.

23/ 5 U.S.C. § 556(c)(5).

24 See Rosenblum, supra note 16, at 639.

25/ Rosenblum, supra note 16.

attractive prospects.

Courts that have faced the ALJ question have had to consider how Congress, in providing ALJs with the aforementioned protections, intended to limit agencies' supervisory influence over the work of ALJs. Pressure of any sort relating to factual findings would be improper. The less the supervision, or communication, have to do with the facts or outcome of a particular case, presumably the less suspect it would become. Communications to ALJs of substantive agency policy intended to obviate an issue in future cases seems quite appropriate, as the Seventh Circuit recognized in D'Amico v. Schweiker.[26]

Promulgation of time limits is, in one sense, the most general kind of policy statement imaginable. It applies to all cases, potentially all employees, and thus would seem an unobjectionable statement of agency goals and procedures. Moreover, promptness is one of several goals to which agencies should aspire and presumably they should have considerable discretion in deciding how to reach it (assuming that the resultant procedure is not so summary as to deny due process). The mere fact that some employees, even ALJs, sometimes would like more time for decision than the agency wishes to afford should not itself be a disabling factor. On the other hand, a deadline can affect an ALJ's handling of particular cases. A deadline arguably could even influence the substance of a decision, by preventing relevant factual inquiry, discovery, or hearings, or by forcing issuance of a decision before the ALJ has considered all the evidence. Whether such influence, combined with potential agency discipline, contravenes the "qualified right of decisional independence" is not an easy question.

Of course, legal precedents become crucial only when an agency seeks to dismiss or discipline an employee for failure to perform. An agency decision to promulgate time limits and monitor all employees' compliance for informational and oversight purposes, would seem secure from legal objection. Also, agencies can avail themselves of other means of averting confrontation, such as ALJ participation in developing time frames[27] and regular discussion of potential problems between Chief ALJs and program and management personnel.[28] In that case, agencies' use of case monitoring and time limits should not provoke the kind of resistance that could be crippling.

IV. NATIONAL LABOR RELATIONS BOARD

The NLRB's case management and information system has been a model of performance amongst federal agencies. Implemented in 1959, this system was devised by lawyers and managers who studied the agency's delay and related performance problems. After an extensive time study was completed, the Office of the General Counsel established overall time goals that were promulgated in 1960 as part of the agency's Rules of Practice. Internally, the agency formed interim time targets for specific stages of the case process. Finally, the Office developed an information system that permitted managers to measure and compare productivity, caseload and case type for each of the NLRB's 33 regional offices.

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[26] 698 F.2d 903 (1983).

[27] See Administrative Conference Recommendation 73-3, supra note 12; Rosenblum, supra note 16.

[28] See GAO report on FERC, supra note 1.

External criticism, more than statutory time limits, constituted the impetus behind the NLRB's self-imposed guidelines. The few time limits imposed on the agency by the National Labor Relations Act of 1935 (NLRA) did not deal with case processing.[29] Shortly before the NLRB acted, Senator John F. Kennedy berated the agency's case processing speed and stated that "justice delayed is justice denied."[30] Faced with congressional pressure and internal backlog, the NLRB decided to create a thorough time goal system that was applicable agency-wide.

Agency Structure and Duties

The NLRB is an independent agency whose functions are divided between a five-member Board and its General Counsel. It has 33 regional offices which are responsible for investigative and prosecutorial functions. The agency employs approximately 3,000 people. Two-thirds are employed in the regional offices, 350 work with the Board and 600 are assigned to the Washington Office of the General Counsel. The NLRB handles approximately 55,000 cases per year, and its caseload has been increasing steadily.

The NLRB has two primary statutory missions. One is the conducting of secret ballot elections among employees in appropriate collective bargaining units to determine whether or not the employees desire to be represented by a labor organization. The other is preventing and remedying of unfair labor practices of employers and labor organization or the agents of either. In addition, the Board also hears jurisdictional disputes.

The General Counsel exercises general supervision over the bulk of attorneys employed by the Board (other than Administrative Law Judges, legal assistants to Board members, the Executive Secretary and the Solicitor, and a few others) and over the offices and employees in the regional offices. Also, the General Counsel has final authority with respect to the investigation of charges and issuance and prosecution of complaints before the Board.

The General Counsel's staff is separated into several divisions. The Division of Operations-Management has full responsibility for supervising all field operations as well as monitoring and directing case flow through the various Washington offices. It is headed by an Associate General Counsel who has six Assistant General Counsels reporting to him.

All cases originate in the regional offices through the filing of unfair labor practice complaints or the filing of representation petitions, and most are resolved at the regional level without any formal participation by the Board. Specifically, approximately 90 percent of the 55,000 unfair labor practice and representation cases coming before the National Labor Relations Board annually are resolved informally by the agency's 33 regional offices. The regional offices operate under the general supervision of a regional director, who is assisted by a regional attorney, and a staff of field attorneys, examiners and clericals. They investigate petitions and charges of unfair labor practices, prosecute unfair labor practice cases and process jurisdictional dispute cases.

29/ As amended in 1947 by the Labor Management Relations Act (Taft-Hartly Act) and in 1959 by the Labor-Managment Reporting and Disclosure Act (Landrum-Griffin Act).

30/ "Twenty Years of Productivity," 2 Performance 1 (1981).

The regional office's investigation of an unfair labor practice complaint usually will be completed within 30 days. The regional director then decides whether the evidence is sufficient to substantiate the charge. If so, the Regional Director may seek a settlement or may issue a formal complaint and a notice of hearing. The case is tried before an ALJ, normally in the geographic location where the conduct in question occurred.

After the hearing is concluded and briefs are submitted, the ALJ prepares a decision stating findings of fact, conclusions of law and a recommended order. If exceptions are filed, the case will be reviewed by the Board, usually acting through a three-member panel.

Besides their role in processing unfair labor practice cases, the regional offices also play an important part in the processing of representation cases. These cases begin with the filing of a petition with a regional office by a union, an employer, or an employee, and proceed with a regional office investigation. In cases where the parties do not sign an agreement consenting to hold a representation election, a hearing may be conducted to determine whether an election should be held. The Board may review a decision if substantial questions of law or policy are raised or if there is a clear error by the regional director on a substantial factual issue.

The NLRB's "Pipeline" System

The time limits scheme that the NLRB established in response to congressional criticism took considerable time to develop, but is not particularly complicated. In fact, a key to meeting the agency's self-imposed goals is found in the system's simple structure.[31] The NLRB's "Pipeline" system sets up objectives for each step in handling the predecisional stages of every unfair labor practice case that the agency handles. The goals are as follows:

Step 1.	Charge is filed	Day 1
Step 2.	Commence Investigation	7 days from charge
Step 3.	Complete Investigation and Determination	30 days from charge
Step 4.	Issue Complaint	45 days from charge
Step 5.	Case Hearing	90 days from charge

These timetables were established in 1959 and still apply in 1983. The cases involving representation petitions are processed according to similar time guidelines.

These guidelines can signal problem areas as they arise and permit the origins of time lags to be traced. Once the root of the delay is found, the problem can usually be alleviated before the problem is compounded. Otherwise, backlogs may ensue, leading to further difficulties caused by handling current cases concurrently with older ones.

The complementary monitoring system is nearly as simple as the timetable; basically, it is based on management by exception. The system is impersonal and concentrates on overall office results. Individual employees are monitored by their team supervisor. The supervisor reports to the Assistant Director, who is responsible to the Regional Director. The process continues in a hierarchical fashion until it reaches the

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31/ Interview with Mr. Joseph DeSio, Associate General Counsel, NLRB.

apex of the information and monitoring system, the Office of the General Counsel.

The case management system is well disciplined. Each Regional Office is required to submit a Regional Case Dispositions Report by the tired working day of each month. The report includes information on a region's intake and investigations counts, pre-complaint situations, methods of disposition, complaints issued, and other comprehensive statistics (See Appendix A).

The Office of the General Counsel aids in the monitoring process by rapidly compiling and distributing the data derived from each office to prepare comparative charts. Each region can measure its performance against all other regions, and the Office of the General Counsel can spot backlogs. Once a problem is spotted, discussions are held with affected regional directors and their offices to determine the extent, cause and possible solutions for lag in performance level.

The system also has built-in mechanisms to insure adequate flexibility. First, a case may be delayed because of external factors, such as the unavailability of witnesses. Instead of judging solely on the numerical statistics, a regional director will determine the reasons for a delay before acting to expedite the handling of a case. Secondly, the Regional Office statistics are based on median measurements as opposed to averages. Thus, according to NLRB officials, it reflects a more accurate assessment of the time it takes a typical case to move through the system.[32]

While applied comprehensively, time limits at the NLRB are not specific requirements, but serve as broad goals. The case handling system is effective also because it is reinforced by additional strategems that strengthen internal discipline and promote healthy competition, such as Senior Executive Service contracts, incentive programs, personnel evaluations, promotions, and recognition awards. These encourage agency workers to give priority to timeliness whenever possible.

Results of the "Pipeline" System

Since timeliness figures are compiled, tabulated and recorded, the quantitative results of the case management system are easy to assess. Tthe median age of cases pending under preliminary investigation prior to the establishment of time limits was 52.5 days in 1958 as compared to 20 days in 1978, a decline of 62%. Before the implementation of the monitoring system, Regional Offices averaged 116 days to process a case from the filing of charges to the issuance of complaints. Now the process is accomplished within a median range of 44-45 days. Significantly, these reductions occurred as the NLRB total case intake tripled. Within two years after the implementation of the case management system, the backlog was virtually eliminated.[33]

The system produced additional, less tangible benefits. First, it appears to have helped the NLRB during the budget process. Because the agency has numerical evidence as to performance and productivity, it has had relative success maintaining an adequate budget during an era of budget-cutting. Secondly, the system can be useful to monitor

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32/ Interview with Joseph DeSio, id.

33/ DeSio, J. and Higgins, John, "The Management and Control of Case Handling, Office of the General Counsel, NLRB", The Bureaucrat, Vol. 2, Number 4, Winter 1974, p. 394.

personnel performance, though timeliness is not, of course, the only measure of performance. Thirdly, the system seems to create incentives by providing goals that even the busiest offices strive to fulfill. Statistics have shown that most regional offices, regardless of size or caseload, will consistently process their cases within the system's time guidelines.

V. CIVIL AERONAUTICS BOARD

In order to reduce its sizeable backlog, the Civil Aeronautics Board was forced to streamline its administrative processes. In 1976 two separate, but related improvements were undertaken by the agency — the implementation of a computer tracking system and development of a manually operated time limit program. The Work Item Tracking System (WITS) initially instituted and overseen by the Board members and their immediate managerial staff, maintained a tight surveillance over work item deadlines and bureau adherence to them. The initial time limits system, overseen by the Managing Director's office, permitted the Board to monitor the course of petitions for rulemaking. This 120-day target period was divided up into component steps, each step having an individual time deadline. When a routine petition was processed through all of its various stages, the sum of the steps would be no greater than 120 days.

The WITS system has changed and expanded gradually, to take in other kinds of cases, and it now has an impact on all CAB bureaus that deal with docketed information. Its flexible case profile system places each incoming case under a time schedule that is broken down into stages. As a case moves through various bureaus and offices, a specific employee at each is responsible for it and must justify any request to change a specified time target. The new deadline, and the reason, are logged into the computer. This makes it difficult to blame others for delay. The CAB helps to enforce the time limits by maintaining accurate, up-to-date status reports on all cases that are monitored regularly. The comprehensive computer system keeps track of all areas of case-handling. It keeps a case from "falling through the cracks" and can serve as an objective method for motivating promptness via reports that remind employees of deadlines. The managers play an important role in communicating with responsible employees and applying pressure where needed.

The many work items that are monitored range from fare exemptions to domestic route applications. The time limit program helps to reduce duplicative steps, and signals problem areas as they occur. However, the quantitative impact of fixed deadlines at the CAB is difficult to measure for two major reasons. First, the agency entered its "sunset" era in 1978 just as the system was expanded and improved. Hence, both caseload and resources to handle it decreased as WITS utilization increased. Secondly, caseload and time statistics were not comprehensively recorded prior to 1976, so (with the exception of the cases affected by 120-day statutory deadlines) no accurate comparisons can be made to determine reductions in case-processing time. In statutory deadline cases, a congressional study on federal regulation documented improvements. One year after the standardized deadlines and complementary managerial programs went into effect, an item's average case age dropped from 10 months to 5 months, and all petitions received during that period, with one exception that required a 30-day extension, were processed within the 120-day deadline.[34]

34/ Committee on Governmental Affairs, United States Senate, Delay in the Regulatory Process 136 (1977).

Structure and Duties

The Civil Aeronautics Board is an independent regulatory agency responsible for the economic regulation of domestic and international air transportation.[35] Among other things, the CAB has been charged with licensing domestic and overseas airline operations, regulating passenger cargo rates and air carrier practices, awarding financial subsidies to eligible air carriers to encourage otherwise unprofitable air service, approving or disapproving mergers, and prescribing uniform systems of accounting for carries. Under the Deregulation Act of 1978, many of these powers have been greatly reduced and the CAB will cease to exist shortly.

The Board consists of five members appointed by the President. The Managing Director, under the Chairman's direction, oversees the Board's workload. The CAB is fairly small (and diminishing) agency, now with approximately 450 employees. The staff has considerable authority to act on a wide variety of regulatory matters under delegations of authority from the Board. Even in matters finally decided by the Board itself, the staff plays an important role in scheduling the work flow, processing applications and other requests, conducting investigations, recommending action, and drafting agency regulations and decisions. Most cases are decided on the basis of written submissions by the parties without formal evidentiary hearings.

As mentioned above, the CAB is subject to several statutory time limits. License applications must be dismissed, set for evidentiary hearing, or processed by nonhearing means within 90 days. Applications set for hearing have an additional 240 days to decision. Under section 1010 of the Federal Aviation Act[36], the CAB must approve or deny within 180 days applications for interlocking relationships, mergers, or exemptions. Except for merger cases, this period is extended to a year if the Board sets the matter for an evidentiary hearing. The Board's own regulations require it to issue a notice of rulemaking, or dismiss a request for rulemaking received from the public, within 150 days after receipt. Thus, both agency-promulgated and statutory time limits are integral to the CAB's operation.

Background of the WITS System

WITS is a computer-based, agency-wide management information system. It was established with the following objectives in mind: (a) facilitate the setting and meeting of overall target dates for individual work items; (b) signal delays as they occur; (c) keep routine items moving; (d) provide a mechanism for top management to interpose alternative priorities; and (e) build a central perpetual inventory of work in the CAB's processing pipelines. Ideally, the goal is to expedite regulatory activities without interfering with the quality of fairness of the agency's proceedings. In retrospect, the CAB feels that present system has met those objectives.

The program was implemented in 1975 under the direction of Chairman John E. Robson, who though that computer system would improve the CAB's capability to act and react in the "timely manner" required by the Administrative Procedure Act.[37] With the

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35/ Its statutory responsibilities are set out in the Federal Aviation Act of 1958, as amended, 49 U.S.V. §1301, et. seq. Those responsibilities were substantially modified by the Airline Deregulation Act of 1978, P.L. 95-504, 92 Stat. 1705.

36/ 49 U.S.C. 1940.
(cont'd)

aid of two data processing specialists, information was gathered from each office within the CAB's bureaus concerning 1,500 work items in 40 categories of administrative proceedings. Their information-gathering stage culminated after 18 months. In addition, it took six months to program and "flow-chart" the data and develop appropriate guidelines.

Revisions have been made over the past six years. The most significant changes have been the addition of a simplified computer language, a language that utilizes conversational English as opposed to computer jargon, and the involvement of middle managers in the monitoring procedures.

Developing Profiles and Internal Target Dates

1. Profiles

For each type of item that the CAB handles, it has devised a "profile," which is like a flow chart outlining its course as it is processed by each of the CAB's various departments in the most expeditious sequence, and specifying the amount of time each step is alloted. It is similar to the NLRB's pipeline structure, though somewhat more complex. Some profiles contain over 60 steps, such as a domestic route application. If a work item requires a decisionmaking step, the profile report will have the options listed, as well as the set of procedures that would follow each option. For example, in the profile of a fare exemption, after the third step the profile direction indicates possible choices to be made in the proceeding. The directions state that if a problem exists after a legal review then the work item should be sent to a staff member who can "recommend action", but if no problem exists then the item's review and pursuant recommended actions should be considered.

Systematically, the profile provides directives, a reliable sequence of events, and an expeditious timetable, and it designates the employee responsible for each stage of the casehandling process.

2. Procedures

Profiles are designed by the Management Systems Information manager with assistance of affected personnel. Together, they informally work out the sequence of steps, and the time allotted to each step. Profiles are revised as problems arise within each bureau. A suggested revision is discussed between the staffer and a Management Systems Officer. Afterwards, the revision is sent to all other offices for approval.

The use of profiles has extended to each type of work item that flows in and out of the CAB. As a document, request or complaint enters the CAB, it is docketed and then logged into the computer which categorizes the work item under a specific profile number. At this point, however, two additional options are available: (1) it may be deemed a "special" case that cannot proceed through the agency at normal speed, or (2) if the Board designates it a "priority" item, then target dates are altered accordingly. This procedure is a necessary step to ensure that each case is treated with individual attention and with the utmost efficiency where possible. This built-in flexibility helps to subordinate the "process" to a secondary level and maintain purpose and fairness as the

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37/ Speech by Rubin A. Caldwell on "The Work Item Tracking System: A Mechanism for Improving Federal Productivity," at The Ninth Annual SMB Conference, 1977.

top priorities.

Problems with Implementation of Time Limits

The two major difficulties that arose within the CAB as the WITS system was implemented were general resistance to change and defensive attitudes concerning the tight surveillance of worker activity.

The first problem will occur within most agencies. The CAB dealt with the resistance by stimulating participation at the managerial level. Once the managers understood the system's benefits, they participated in the WITS system to aid them in their administrative duties. Other staff members learned to use it, also, through the educational program offered by the agency's computer specialists and the assistance of the interested management.

However, middle management did not become actively involved in combatting delay through computer tracking until the second problem, an overly rigid oversight system, was addressed. The CAB discovered that too much "coercion" can cause unfavorable attitudes that can harm worker productivity and diminish cooperation with managers who wish to enforce firm time limits.

The WITS system began as a top-level management program. Target dates set on a prioritized proceeding could not be altered by anyone except the Board's Managing Director. He had to approve all time extensions and then his staff of computer operators had to log the alterations into the computer.

In contrast, after 1977 the rigid system became less formalized and more accessible, and hence, more accepted. Middle managers were trained to use the WITS system and manage the time limits within each bureau. The CAB's Bureau division managers were authorized to change target dates and approve other schedule alterations and required to log explanations for time extensions into the computer. The division manager's daily cases status report lists all reasons for time changes on the computer printout, as well as the number of times a case's schedule has been revised. Because the record of the delay is hard data that is accessible, visible, and updated regularly, it is easier to enforce than less well-documented time limits. The program, while less regimented than the original WITS system, appears more effective.

Currently, the established time limits are overseen agency-wide by one person, the Chief of Minutes, who monitors the system[38] develops reports, indicates areas that need revision, and highlights serious delay. He is responsible for contacting each office to determine the reasons for the backlog and helping solve managerial problems by working out more viable guidelines, streamlining proceedings or admonishing poorly run offices. The system is no longer "policed" by the Managing Director's office.

The CAB's experience shows the utility of developing a computer language that can be learned quickly and used by staff members. At its inception, the WITS system was not a program that a lay person could operate. It was a system designed by computer specialists for computer specialists,* so that later, when the WITS system spread to the mid-management level, most people had difficulty learning the computer language and operating its complex programs. The CAB overcame much of its language barrier problems with the development of a complementary query system that is based in a language similar to conversational English. Once it was implemented, time limit changes and

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38/ Interview with Norbert Kaus, July 1982.

monitoring became a simpler, more accessible process. As a result, in 1983 90 percent of all department management personnel used the WITS system in their daily routines.

Qualitative Advantages

Reliable data on the impact of the WITS system is hard to obtain because manpower and caseload have been diminishing steadily as a result of airline deregulation. Nonethless, the following advantages are evident.

1. It reduces duplication of effort. As a profile is designed, managers and staff members in affected bureaus develop an organized format of steps that are charted from start to finish. In creating the 120-day statutory time limit profile, the normal number of process stages — formerly 20 to 25 — was reduced to about fifteen. What managers discovered once they plotted a work item's course was that many procedures were needlessly duplicated in a bureau. For example, a manager formerly had to approve a work item after each staff member processed it, instead of one time at the end of its departmental circulation. In another instance, prior to establishment of the system, different bureaus sent one case to the Board three times. Under its present time schedule the duplicative steps are omitted, thus saving days of paper shuffling.

2. WITS reduces time spent on monitoring deadlines. This is because of two factors: the reduction in backlog and the designation of a responsible party for each stage of the process. Because workers can concentrate more heavily on work that is "on the track" and flowing, rather than pending, the tendency for delay is lessened. Workers no longer have to contend with cases that are a year old. Instead, they can deal solely with incoming work items that proceed along a predictable track. Furthermore, the designation of a specific person responsible for a work item enables supervisors to survey case progression without wasting time searching for the person handling the case. For instance, when inquiries arise about a particular rule or other case's status, the computer can display within seconds who has it and in what stage it is pending.

3. Items do not get lost as often. Within any agency where substantial paperwork is transferred from office of office, papers often get misplaced or "stored". Under the time frames within the WITS system and the monitoring of delayed proceedings, the computer stores up-to-date information about case location and status.

4. It exposes problem areas. A Division Manager can spot delayed proceedings daily as he reviews his General Case Manager's Report (GCMR). If a bottleneck begins to form within one bureau, the manager can note it as it occurs and act more quickly.

5. Statistics and inquiry responses are compiled quickly. Because the centralized WITS system also serves as a data bank, computations can be made and statistics compiled within a matter of seconds. General inquiries about past cases or present cases and their due dates can also be answered quickly.

6. It saves employee time. Time that was previously spent determining where the file on a case was located, or when an item would be completed, can now be directed towards more important matters. Docketing time is also reduced. Overall, it can make the agency more responsive, and can reduce manpower requirements, particularly in clerical areas. The WITS system enabled the CAB to reduce the number of workers in its docket room substantially.

7. It can substantiate productivity and help avert statutory deadlines. In 1978, as part of the Airline Deregulations Act, Congress was considering implementing statutory

deadlines. With the information readily available under WITS, the CAB was able to provide a comparison of its projected time limits to the congressional time limits. Because the agency had a tracking system and self-imposed limits, the CAB was able to avert overly rigid statutory time limits.

Conclusion

The CAB has developed techniques that can be adopted by other agencies suffering from delay. The usefulness of its organizational techniques is apparent. Convincing agencies of the benefits of a computerized system will depend on agency size, caseload and case type. Advantages exist, but they are not as important as developing a system to monitor time limits conscientiously.

VI. DEPARTMENT OF HEALTH AND HUMAN SERVICES GRANT APPEALS BOARD

HHS' Departmental Grant Appeals Board hears appeals by grant and cooperative agreement recipients seeking to dispute decisions of the Social Security Administration, Health Care Financing Administration and other component agencies of HHS. Approximately three years ago, HHS' Departmental Grant Appeals Board had a large backlog with each case taking, on the average, 368 days to complete. Recent statistics show a current average case age of 159 days. Much of the reduction in processing time and backlog (which has almost been eradicated) can be attributed directly to the introduction of time limits, promulgated and informal, combined with related managerial techniques.[39]

Organization and Duties

Commencing in the 1970s, federal agencies charged with the responsibility of administering federal grant programs increasingly have used grant appeals boards established by regulation to decide many kinds of disputes between the granting agencies and their grantees. The first of these appeal boards—and one that has served as a prototype — was established by the Department of Health, Education and Welfare in 1973. The recently revised regulation governing the Board accords states, local governments and other HHS (formerly HEW) grantees under designated programs the right to appeal certain types of final decisions of an HHS constituent agency on a dispute arising under an existing grant. These cases may involve, for example, disagreements arising out of an auditing procedure that determines that a state or local grant recipient must repay some grant money. The grantee may contest the initial agency decision by appealing to the Departmental Grant Appeals Board. The Board, upon the basis of written submittals by the grantee and the granting agency, and often supplementary evidentiary hearings, renders a legally based, written decision resolving the dispute.

The Board consists of four members, aided by a legal and clerical staff. Each case is resolved by informal adjudication or by a mediation process recently implemented for some cases.[39a] The former is much like a APA adjudication, but usually involves less discovery and is decided by a presiding officer who is not an administrative law judge. The mediation process involves a Board staff attorney in a more active settlement role and usually takes slightly less time. At present, the Board is handling between 225 and 250 cases, of diverse size and complexity, involving disputes over amounts ranging from a few thousand to several million dollars.

Time Limits System

In 1981, the Board had no time limits in its regulations, nor was it subject to any statutory time limits. As part of their new Board Chair's Senior Executive Service contract, however, he agreed with the Department to reduce the backlog in his office.[40]

39/ Interviews with Norval D. (John) Settle, Chair, HHS Departmental Grant Appeals Board, July and August 1983.

39a./ *See*, Barrett, Use of Mediation Procedures in Connection with More Formal Adjudication of Grant Disputes (1982); Steinberg, *Procedures for Resolving Disputes Under Federal Grant Programs*, 1982 ACUS 137 (Vol 1.) (1984).

(cont'd)

As a by-product of his contractual obligation several "goals" were published as part of the Board's procedural regulations in the Federal Register of August 31, 1981.[41] Section 16.23, "How Long an Appeal Takes", established "general goals" for its consideration of cases. Its goals included time frames that apply to each step of agency proceedings. First, for regular review based on a written record under §16.8 (preparation of an appeal file and written argument) a six months time frame was set. After the review of an appeal file the Board may opt to schedule a conference to clarify issues and questions. Again, the deadline is six months; for cases which require a hearing, a hearing must be held and decision written within nine months. And thirdly, a case can be processed in an "expedited fashion"--those cases involving $25,000 or less and containing no complicated or unusual circumstances—within three months. The expedited process involves a streamlined document exchange and issue formation process, and generally relies on a telephone conference involving all parties.[42]

The Board's stipulations are goals rather than requirements, which is consistent with its intent to allow flexibility and permit considerations of sound decisionmaking to take precedence over speed. These self-imposed time limits are subject to periodic review and revision.

It must be noted that implementation of the rules has been complemented by internal time limits that are adapted to each case as it is assigned, and additional managerial methods. The Board has two supervisors and two teams of lawyers who aid the Board members and mediate cases. Each supervisor, a GS-15 level employee, coordinates the activities of 7 or 8 attorneys. As cases are filed with the Board, one employee receives and categorizes them. Next, he discusses the case allocation with each supervisor to determine attorney assignments. Once determined, the supervisor, the attorney and a Board member sit down at an informal "negotiating" session to establish an appropriate timetable for the case, based on its complexity and the attorney's workload. This process is implemented for all cases, whether they are to be handled through adjudication or mediation.

Enforcement techniques vary with each employee. Once target dates are set, personnel generally tend to adjust priorities accordingly. Problems that do arise are handled by (1) actively discouraging delay, (2) posting a list of particularly overdue cases in visible sites, and (3) channeling cases which can be diverted from the traditional process through streamlined steps to promote more expeditious case handling.

Employees and parties are generally discouraged from asking for time extensions. When the employee asks for an extension, for example, he might be informed that it will be granted this time, but not the next. In other cases, compromises may occur, with a request for 40 days being negotiated so that a 25-day extension is granted instead.

Charting overage cases, a form of peer pressure, is used only when cases are noted

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40/ This is reflected in the Chair's performance plan.

41/ 45 CFR Parts 16 and 74; 46 Fed. Reg. 43,816, Aug. 31, 1981.

42/ Another pertinent revision to the Grant Appeals Board Rules is found in subsection 16.7. It states that "within 10 days after receiving the notice of appeal, the Board will send an acknowledgment, enclose a copy of procedural steps an appellant must take, and advise him of the next steps. The Board will also send a copy of the notice of appeal, its attachments, and the Board's acknowledgment to the respondent."

as particularly overdue, regardless of the reason. The chart of overage cases contains a list of fixed, negotiated deadlines established with the responsible attorney in one column, and the number of days the case is overage in the next. The chair compiles and posts a master copy of the month's overage case chart in his office, and distributes copies of the chart to each supervisor and attorney. This pressure, which stems from a concern for image and credibility, appears to be an effective tool to use with self-motivated employees.

The third techniques seeks to save time by directing cases through informal proceedings where possible. The informal proceedings utilize an ombudsman-type format to save several months of case handling time. By eliminating some steps, such as orders to show cause and other niceties, hours of preparatory time may be saved. This permits attention to be diverted to the complex cases that can require large amounts of attorney time.

The Board's chair has no future plans to implement additional target dates or rules, and feels that the Board is too small to implement a computer tracking system. However, he receives comments and suggestions on the effectiveness of the time limits through staff meetings. After two years of the time monitoring system, it was concluded that too much policing hampered employee motivation and the pressure of certain deadlines was eased by granting extensions more liberally and allowing more room for employee discretion on complex cases. The balance point between "too much" and "too little" is elusive and constantly fluctuating, but is one to which supervisors must remain constantly sensitive.

Advantages of Time Limits

Time limits have helped to organize case proceedings and reduce backlog. The reduction in backlog frees more time for staff to engage in front-end activities, particularly mediation which often leaves both parties with a more equitable result. Also, deadlines foster more efficient handling of cases since both parties have a better retention of case facts and are more productive when the case is "fresh" in their minds. Many common procedural problems associated with delays are avoided, such as locating witnesses or documents, educating new Board or party personnel, or rescheduling hearing dates.

Implementation Problems

The largest obstacle at the Board was one overcoming old habits and adapting to the self-imposed regulations. It took a period of several months to implement the system completely with full participation. Also, there have been occasional complaints from parties or outside agencies that felt the Board was moving proceedings too quickly. The Board's published rules attempt to meet this problem by providing that any case with complex circumstances will be allowed sufficient time to ensure a fair and equitable treatment of the case. The Board's goals advocate that the timeliness of case handling should not override the fairness of a trial, and that time limits be formulated with this in mind. Flexibility in enforcement of the rules appears to reflect this goal.

Today, delay at the Board, while not insignificant, can be attributed primarily to external factors, as opposed to managerial ones. To illustrate, the two leading causes of delay in 1981-82 were (1) delays requested by the parties and (2) disagreements between board members on what the outcomes of various appeals should be.

Conclusion

The Board has found time limits an effective way to free resources, streamline processes and monitor every item. Setting a time schedule with each lawyer as the case enters the office places each case into a time frame that guides the speed and direction of the cases. Also, use of backlog reduction as a performance measure in SES contracts, as in Mr. Settle's, may prove generally useful to stimulate agency managers to take steps to reduce delay. The Board's relatively simple monitoring techniques seem pertinent to many agencies.

VII. FEDERAL TRADE COMMISSION

The FTC has received considerable criticism over the years for the time required to complete its investigations and adjudications. For example, an ABA Commission to study the FTC noted in 1969, "Problems of delay have vexed the FTC ever since it was established . . .".[43] More recently, the Commission's cumbersome trade regulation rulemaking procedures have aroused similar complaints (among others). While the FTC has taken steps to ameliorate delays, statistics developed by the Administrative Conference show that in recent years it has taken between two and four years to complete FTC adjudications and five years to conclude a rulemaking proceeding.[44]

From time to time, FTC officials have attempted a variety of improvement strategies, from continuous hearings to deadlines for ALJ decisions. Nonetheless, many cases have proven virtually intractable, because of lengthy discovery and hearings, complicated issues, or delay at the Commission level. Last year, the FTC began a new approach, streamlining the Commission's decisionmaking processes in several areas, particularly those relating to Commission level review of initial decisions and voting and assignment procedures. While these reforms'efficacy has not yet been proven over the long haul, they merit consideration as an example of commitment at an agency's highest echelons to combatting delay.

Structure of the Agency

The Federal Trade Commission is an independent agency, comprised of five members (including a chairman) appointed by the President and confirmed by the Senate. It is charged with protecting the public from deceptive advertising and unfair trade practices and preventing unfair methods of competition. The FTC has about 1200 employees working at its Washington, D.C. headquarters and ten regional offices.

The FTC is authorized to undertake adjudications and rulemakings in carrying out its duties. Ordinarily, the initial step in an FTC proceeding is investigation of an alleged violation; during investigation, the FTC has considerable authority to compel production of documents, take oral testimony, or hold hearings. If a staff investigation reveals a violation, and a majority of Commission members agree to issue a complaint, an adjudicatory proceeding before an administrative law judge is held to decide whether violations of the law have occurred and if a cease-and-desist order should be issued. The ALJ's initial decision can be appealed to the Commission and then to a federal Court of

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43/ *See* note 1.

44/ Administrative Conference of the U.S., *Federal Administrative Law Judge Proceedings: Statistical Report for 1976-78*, 159-63 (1980). Boyer, *Report on the Trade Regulation Rulemaking Procedure of the FTC*, 1980 ACUS 33, 1979 ACUS 41.

Appeals. Adjudication typically involves one or more prehearing conferences, considerable discovery, evidentiary hearings, and Commission review.

The FTC also conducts, from time to time, proceedings to develop substantive rules defining unfair conduct and prescribing preventive safeguards. These rulemaking proceedings, usually directed at industry-wide practices that are alleged to unfairly exploit consumers, entail procedures that by statute are considerably more complex than those prescribed by the APA. They require informal oral hearings before a "presiding officer," complete with cross-examination. After the hearing, the FTC's rulemaking staff prepares a report analyzing the record and recommending a final rule. Then, the presiding officer recommends a decision and, after additional input from the public and other parts of the FTC, the Commission decides whether to issue a rule regulating the conduct in question.

Commission Reforms to Reduce Delay

In September 1983, the Commission met and adopted a series of new deliberative procedures based on recommendations developed by Chairman James C. Miller.[45] The major changes affected decisionmaking at the commissioners' level. Several involved voting, where commissioners previously had almost unlimited time to cast votes on many matters before them; the new procedures subject them to time limits for matters decided by written circulations.

While many important FTC decisions are made at formal Commission meetings, most matters before its members are decided as motions circulated in writing. Timely processing of written circulations has at times troubled the FTC, with action sometimes being delayed by a dissenting commissioner's failure to vote. To ensure prompt effectiveness of FTC decisions, the new procedure gives commissioners 14 days to vote from the time a majority of his or her sitting colleagues has recorded votes on one side of a motion. A commissioner may wish to circulate a "topping motion" amending or substituting for the original motion; if he or she does so, and if the new motion obtains two affirmative votes, the limitation is tolled until the motion is resolved. A similar process with shorter time limits governs "walk-around" circulations, which are used in matters requiring prompt resolution.

Deadlines will also be used to expedite appeals to the Commission from ALJs' initial decisions. The Commission agreed to set, immediately following oral agreement of an appeal, a target date for issuance of its decision and to set internal target dates for preparing an opinion. To expedite appeals handling, the Commission also agreed to make greater use of its Office of General Counsel and Bureau of Economics in opinion drafting and to amend its rules of practice to require the parties to file an index of their exhibits and witnesses.[46] The Secretary is responsible for preparing a weekly list of all outstanding adjudications that have been circulated by the commissioners.

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[45] The FTC's revisions are described in Miller, "Chairman Takes Steps to Improve Efficiency at FTC," Legal Times, October 31, 1983, 13. The discussion herein is drawn largely from that article, and from Chairman Miller's October 1983 memorandum to the Council of Independent Regulatory Agencies.

[46] 48 Fed. Reg. _____ (1983) (to be codified at 16. C.F.R. §3.46).

In addition, the FTC modified its rotational system of assigning new matters to its members to permit a commissioner with a heavy workload to be passed over for a reasonable period. It also placed a deadline on commissioners' processing of assignments, requiring them to circulate all assignments, either with a motion or on an informational basis, within 30 days after receipt. The Secretary of the Commission is now responsible for distributing to members a weekly list of all pending assignments.

The commissioners approved delegations of authority in deciding petitions to quash compulsory process and in closing investigations. Below the Commission level, the Secretary distributes to the members a monthly report listing target deadlines that the Commission has established for staff handling of matters. In addition, the commissioners plan to meet with the FTC's ALJs to discuss ways to expedite the trial of adjudicatory proceedings.

Conclusion

As the Senate Governmental Affairs Committee recognized, the self-discipline of agency members in establishing and adhering to deadlines is essential, since it can set an example for others in the agency.[47] While the FTC's initiatives are too new for their full impact to be gauged, if adhered to they should serve at least to speed Commission processing of its business and possibly to strengthen the hands of agency managers interested in improving the FTC's deliberative process at all levels.

VIII. CONCLUSION

Delay in federal agencies occurs for many reasons, but as this study suggests, a variety of options are available to agencies wishing to develop time guidelines and case monitoring systems as one response. Given the nature of bureaucracies, which abide by rules and standardized working procedures and can become very resistant to structural changes that require the substitution of new work habits and expectations, the difficulty in implementing a time limits scheme should not be underestimated. Introducing a time limit program will require commitment far beyond the mere promulgation of a set of rules. To have any effectiveness, it demands the commitment and participation of all those involved, as well as the creation of optimal conditions for such a change.

These techniques cannot be implemented without the realization that a structural change requires a commitment of time, planning and personnel. An agency that implements time limits should allocate the resources necessary to ensure that such commitments can be kept. It should take pains in developing time limits. Once guidelines has been issued, then the internal explanation, instruction, monitoring and feedback must begin.

A cooperative environment must be fostered. Two agencies noted that their time limit systems had been too harsh at one point during the implementation process to yield satisfying results. The Chair at HHS' Departmental Grant Appeals Board found that staff members felt unnecessarily pressured because they were supervised too closely. CAB workers felt that the initial system was too inflexible as well. Some decisional officials may feel their "independence" threatened. At the extreme, reactions to a system that polices staff members can range from fear to resentment because it may signal that supervisors do not trust employees. At both HHS and the CAB, some workers initially

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47/ Delay in the Regulatory Process 140.

thought that the deadline systems pushed rather than reminded them of time restrictions, and that they focused on apparent problem areas without considering situational factors that delayed work items. Adjustments at both agencies proved helpful.

Agencies can lessen the resistance and promote cooperation by using several techniques. Employees participating in decisionmaking will be less resistant if they see time limits being enforced at all levels in the process. Feedback channels must be available, since employees frequently can determine fallible planning more quickly than those who devise it. Moreover, feedback channels indicate that agency officials welcomes employee suggestions and complaints because s/he trusts his/her judgment.

Additionally, employees will more likely accept changing procedures if they can participate in their development.[48] Very simply, this means that if the management announces a change (such as time limits and case monitoring) without first discussing the problem with or giving any forewarning to affected staff members, then they will probably encounter greater resistance. A fear of the unfamiliar can thwart change, particularly when the change involves the introduction of new technology. ". . . (B)efore we exchange one set of fears for familiarity, the residual fears can lead to immobility." But, if the staff members are familiarized with the agency's concerns at the start of the process, then they are unlikely to have as much fear and discomfort. Furthermore, if employees participate in a goal's establishment then they can understand it more fully. Thus, uncertainty is minimized at the outset of each case proceedings. The participation also promotes a sense of employee involvement and control that can lead to more cooperation and satisfaction.

Time limits and monitoring can be implemented for most agency adjudicatory and rulemaking proceedings. Several agencies have used time frames with success, each one doing so differently. The important point to note is the results. At each agency that implemented a system, the benefits from reducing delay appeared to outweigh the system's resource demands, decisional effects, and other drawbacks. These agencies' experiences can serve as lessons to others, and as the heads of more federal agencies decide to experiment with time target programs, those that follow can learn even more from their predecessors' experience.

48/ This point has been recognized by the Administrative Conference in Recommendation 78-2, which called for consultation with ALJs and other affected interests to develop standards for expeditious disposition of Social Security appeals, and Professor Rosenblum in his draft report, which calls for involvement of ALJs in developing productivity standards, supra note 16.

BACKGROUND REPORT FOR RECOMMENDATION 86-8

ACQUIRING THE SERVICES OF NEUTRALS FOR ALTERNATIVE MEANS OF DISPUTE RESOLUTION AND NEGOTIATED RULEMAKING

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Report to the Administrative Conference of the United States

November 19, 1986

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ACQUIRING THE SERVICES OF NEUTRALS FOR ALTERNATIVE MEANS OF DISPUTE RESOLUTION AND NEGOTIATED RULEMAKING

GEORGE D. RUTTINGER*

I.

INTRODUCTION

Efficient resolution of disputes involving federal agencies is often impeded by the formalities of the adjudication or the litigation process. In recent years, private parties and the federal government have been searching for ways to streamline the litigation process by developing alternative means for dispute resolution.[1] To this end, the Administrative Conference of the United States ("ACUS") has recommended that administrative agencies, where not inconsistent with statutory authority, adopt alternatives to litigation such as arbitration, mediation, and minitrials.[2] The various techniques for resolving disputes without resort to full litigation or adjudication are referred to as Alternatives Means of Disputes Resolution, or ADR.

In the sphere of administrative rulemaking, similar trends have developed. In recent years, several agencies have experimented with a technique referred to as negotiated rulemaking, which involves convening potentially interested parties to negotiate the details of a proposed rule before it is published for notice and comment in accordance with the Administrative Procedure Act.[3] ACUS has been instrumental in promoting such experimentation through its Recommendations 82-4 and 85-5, both of which are entitled "Procedures for Negotiating Proposed Regulations."[4]

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[1] See, e.g., Harter, Points On A Continuum: Dispute Resolution Procedures and the Administrative Process, Report to the Administrative Conference of the United States (June 5, 1986).

[2] ACUS Recommendation 86-3, "Agencies' Use of Alternative Means of Dispute Resolution", 1 C.F.R. § 305.86-3.

[3] See, Harter, Negotiating Regulations: A Cure for Malaise, 71 Geo. L.J. 1 (1982).

[4] 1 C.F.R. §§ 305.82-4 and 85-5. See also, ACUS Recommendation 84-4, "Negotiated Cleanup of Hazardous Waste Sites Under CERCLA," 1 C.F.R. § 305.84-4.

A key figure in the effective working of ADR and negotiated rulemaking is the "neutral" who generally presides at the proceedings and attempts to assist the parties in reaching a negotiated resolution or, in the case of arbitration, issues a decision on the matter in dispute. The various types of ADR neutrals may be summarized as follows:

Minitrial Neutral Advisors. "A minitrial is a structured settlement process in which each side presents a highly abbreviated summary of its case before senior officials of each party authorized to settle the case."[5] In some (but not all) minitrials, a "neutral advisor" participates in the minitrial and subsequent efforts to settle the dispute. Typically, the neutral advisor is a private individual who is selected by the parties in dispute, namely the government agency and the private party or parties engaged in litigation or adjudication with the government. The role of the neutral advisor varies, but his duties may include presiding at the hearing, questioning witnesses, acting as a mediator during negotiations between the representatives of the litigants, and rendering an advisory opinion to the parties. In no event does the neutral advisor render a decision that is binding on either party to the minitrial.

Mediators. A mediator is simply a neutral third party who attempts to assist parties in negotiating an agreement. A mediator has no authority to make any decisions that are binding on either party.

Arbitrators. Arbitration is another form of litigation or adjudication, without some of the formal trappings. An arbitrator is a neutral third party who issues a decision on the arbitration issues after receiving evidence and hearing arguments from the parties. The arbitrator's decision may or may not be binding. Arbitration may be voluntary, in which the parties agree to resolve the issues in dispute through arbitration, or it may be mandatory, in which a statute or contract specifies arbitration as the exclusive means for resolving disputes.

Convenors-Facilitators for Negotiated Rulemakings. Negotiated rulemakings generally proceed in two phases. In the first phase, a "convenor" studies the issues presented by the proposed regulation, attempts to identify the interested parties, and then advises the agency regarding the feasibility of convening the interested parties in an attempt to negotiate a proposed regulation. If the agency decides to go forward with negotiated rulemaking, the facilitator then meets with the interested parties and attempts to mediate their differences and develop a proposed rule. Under the concept put forward by the ACUS recommendations, the proposed rule developed through this process is then published for notice and comment pursuant to Section 553 of the Administrative Procedure Act. The convenor and facilitator may be, and often is, the same person or persons. The convenor/facilitator has no authority to make any decisions that are binding on the interested parties to the negotiated rulemaking or the agency promulgating the rule.

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[5] ACUS Recommendation 86-3, 1 C.F.R. § 305.86-3.

One of the by-products of the movement toward ADR and negotiated rulemaking is the need for agencies to develop methods for identifying qualified neutrals and acquiring their services. This process involves a number of issues that will be explored in this report. Among those issues are the following:

1. Qualifications. An agency dispute or rulemaking may involve technical issues arising under a complex regulatory scheme. How can agencies insure that neutrals that are hired to promote negotiation of settlements are qualified to assist the parties in sorting through such issues? Are technical expertise and substantive knowledge required, or do generic mediation skills suffice?

2. Procurement procedures. Statutes and regulations governing procurement of services by federal agencies require competition and specify a series of procedural steps for ensuring that competition is maximized. In some cases, these procedures may be inconsistent with the agency's need for expedition in acquiring the services of an outside neutral. Are there other ways in which agencies can acquire neutrals' services expeditiously within the competitive system mandated by statute and regulation?

3. Delegation. Most neutrals lack authority to render a decision that is binding upon either the agency or private parties. However, in the case of binding arbitration, questions continue to be raised about whether decisions delegated to executive agencies by Congress can be re-delegated to private parties for binding resolution. What are the potential "delegation" issues with respect to binding forms of ADR, particularly arbitration?

4. Long-term structural issues. The universe of neutrals who have specific experience in the experimental forms of ADR and negotiated rulemaking is presently very small. If the use of such techniques by agencies expands, how can agencies broaden the base of individuals or organizations who are available and are experienced in the arbitration/mediation/facilitation process? Should federal agencies develop a centralized roster of neutrals from which all agencies could draw? To what extent should the federal government utilize and

expand the capabilities of government employees in dispute resolution?

This report will explore these and other issues, drawing heavily upon the experience of agencies to date.

II.

ESTABLISHING QUALIFICATIONS

A. Potential Criteria

The qualifications required to serve as a neutral vary depending upon the nature and complexity of the issues, the type of dispute resolution technique employed, and the size and importance of the dispute or regulation to be negotiated. In many cases, seeking an ideal combination of qualifications and experience would unduly limit the pool of individuals available to serve as neutrals. For example, only a handful of private parties have actual experience in convening or facilitating the negotiation of environmental regulations. Thus, in determining the criteria applicable to selection of a neutral, agencies will need to balance their desire for competence and experience against the need to avoid exclusivity.

There are various levels of training and experience that could be considered adequate to perform the function of a neutral in a given case:

1. General dispute resolution experience. Some of those contacted in connection with this report expressed the view that "mediation is mediation" -- that is, a person who has skill and experience in mediating disputes can perform the role of a neutral, regardless of the substantive issues involved. The Federal Mediation and Conciliation Service ("FMCS") has responsibility for mediating labor disputes under the Labor-Management Relations Act of 1947.[6] But FMCS labor mediators have performed a variety of other dispute resolution functions. Recently, an FMCS mediator successfully acted as convenor of a negotiated rulemaking for the Federal Aviation Administration ("FAA") in

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[6] 29 U.S.C. § 173.

developing proposed regulations concerning flight and duty time for aircraft crews.[7]

2. Experience in specific ADR techniques. As noted, agency experience with ADR and negotiated rulemaking has been relatively limited to date. If the selection of neutrals is confined to persons with direct experience in these techniques, the fear of exclusivity will become a reality.

3. Technical expertise. There is no denying that it would be useful in arbitrating a dispute regarding licensing of a pesticide under the Federal Insecticide Fungicide and Rodenticide Act to have a degree or some formal experience in chemical engineering. Similarly, knowledge or experience in the construction industry would aid a neutral in mediating the settlement of a construction dispute. Depending upon the nature of the issues involved, it may or may not be necessary to have such technical expertise in order to understand and communicate the conflicting positions of the disputants in a way that will promote settlement.

4. Knowledge of the statutory/regulatory scheme. Particularly in regulatory negotiation, familiarity with the legal framework in which the regulation is being developed may be an important criterion in selecting a neutral. In the arbitration setting, the Supreme Court upheld mandatory arbitration of Medicare claims by employees of private insurance carriers in part on the basis that agency regulations required such arbitrators to possess "a thorough knowledge of the Medicare program and the statutory authority and regulations upon which it is based . . . ."[8]

5. "Absolute Neutrality". Screening out potential neutrals who have a personal or financial interest in the proceeding will always be an important step

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[7] See Harter, Regulatory Negotiation: The Experience So Far, Resolve, Conservation Foundation 6-7 (Winter 1984); Perritt, Analysis of Four Negotiated Rulemaking Efforts, 1985 Recommendations and Reports of the Administrative Conference 637, 712-26.

[8] Schwieker v. McClure, 456 U.S. 188, 199 (1982) (emphasis in original).

in the selection process. But some agencies have gone beyond such basic conflict-of-interest considerations by insisting upon neutrals who have no past or present affiliation with any side of the controversy. Such insistence upon "absolute neutrality" could be an extremely limiting qualification, particularly since many of the persons who are most knowledgeable in a given regulatory scheme have been affiliated with either government or private industry, and sometimes both.

B. Agency Experience

1. Minitrials

a. Corps of Engineers

The agency that has had the most experience with minitrials is the U.S. Army Corps of Engineers.[9] In its Engineer Circular No. 27-1-3, dated September 23, 1985, the Corps has set forth detailed guidelines for the use of minitrials, together with a model "Minitrial Agreement".[10] The Engineer Circular specifies that the minitrial neutral advisor "must be an impartial third party with experience in government contracting and litigation."[11] In the two minitrials that the Corps has successfully completed to date, it has used a retired judge from the United States Court of Claims and a university professor of government contracts law as neutral advisors. Corps attorneys who are responsible for the minitrial program have stated their desire, at least at the initial stages of the minitrial program, to utilize neutral advisors who have no present or past affiliation with either the government or private construction contractors. This means that in the short term, the pool of persons who have the requisite neutrality and government contracts expertise to serve as neutral advisors for Corps of Engineers minitrails will be limited.

b. Department of Justice

On June 19, 1986, the Commercial Litigation Branch of the Department of Justice issued a "Policy Concerning the Use of

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[9] See Ruttinger, Army Corps of Engineers Settles $45 Million Claim at Minitrial, Alternatives to the High Cost of Litigation, Center for Public Resources, vol. 3, no. 8 (August 1985).

[10] A copy of the Corps Circular, together with the model agreement, is reproduced as Appendix A to this Report.

[11] Engineer Circular No. 27-1-3 at 3.

Mini-trials,"[12] which encouraged Branch attorneys "to assess cases assigned to them for the potential for resolution by mini-trial . . . ."[13] The Policy provides that, where appropriate, the parties may agree upon a neutral advisor to assist the management officials in resolution of the dispute. With respect to the qualifications of the neutral advisor, the Policy states as follows:

> The neutral advisor should be a person with either legal or substantive knowledge in a relevant field. The neutral advisor should have no prior involvement in the dispute or the litigation and must possess no interest in the result of the mini-trial.[14]

c. Department of the Navy

The Department of the Navy has embarked upon the experimental use of minitrials to resolve disputes arising under Navy contracts. The Navy has expressed a preference for utilizing administrative judges from the Armed Services Board of Contract Appeals ("ASBCA") to serve as neutral advisors. The ASBCA is one of the forums designated by the Contract Disputes Act of 1978[15] to conduct hearings and render decisions on disputes arising under government contracts. However, in its first minitrial of a contract dispute, the Navy utilized the services of the same university professor of government contracting who had earlier been employed by the Corps of Engineers as a neutral advisor.

d. Department of Energy

The Energy Department has conducted a minitrial on a contract claim in which the neutral advisor was a former ASBCA judge who was practicing government contracts law with a private firm.[16]

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[12] Copy of this Policy is reproduced as Appendix B to this Report.

[13] Commercial Litigation Branch Policy Concerning the Use of Mini-trials (June 19, 1986) at 1.

[14] Id. at 3.

[15] 41 U.S.C. § 601 et seq.

[16] It is also possible to conduct a minitrial without utilizing a neutral advisor at all. This was done to resolve a contract dispute between the National Aeronautics and Space Administration and TRW Inc. See "Minitrial Successfully Resolves NASA-TRW Dispute," The Legal Times (September 6, 1982), p. 19.

2. Negotiated Rulemakings

Neutrals for "reg neg" procedures have come from several sources. In some cases, agencies have tapped the private sector for convenors and facilitators. In other cases, government personnel, including an FMCS mediator and a staff attorney for the rulemaking agency, have performed these functions.

a. Department of Interior

In January 1986, the Department of Interior issued a Request for Proposals for convening and facilitation services for negotiated rulemaking on air quality regulations for the California Outer Continental Shelf ("OCS"). The evaluation factors for this award are detailed, and include specific ability and achievement as a facilitator, knowledge of the Outer Continental Shelf Oil and Gas Program and the Outer Continental Shelf Lands Act, understanding of the needs of the Department of Interior and other parties to the rulemaking, general dispute resolution skills, and "practical knowledge of the convening/facilitating process."[17]

b. Council on Environmental Quality

In April 1986, the Executive Office of the President, on behalf of the Council on Environmental Quality ("CEQ"), issued a Request for Proposals ("RFP") for an indefinite quantity contract to supply various types of services in connection with negotiated rulemaking, including convening, facilitating, documenting, resource support, analytic support, and training. The RFP specified that the overall purpose of the contract is "to assist EPA, CEQ, and other participating agencies with joint projects in the area of regulatory negotiations."[18] In setting forth evaluation criteria for award, the solicitation states that technical proposals will be evaluated in part according to "the availability of an appropriate disciplinary mix of environmental scientists and technicians to accomplish tasks required under the scope of work."[19]

One of the successful offerors in the CEQ procurement, the Conservation Foundation, proposed a team approach in which each regulatory negotiation would be staffed by a "senior dispute resolution professional" and appropriate technical personnel selected in consultation with the agency.[20] The Foundation's proposal provided the following rationale for combining mediation and technical expertise:

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[17] Solicitation No. 3292, January 4, 1986, § M-2. Section M of the Solicitation, "Evaluation Factors for Award," is reproduced as Appendix C to this Report.

[18] Solicitation No. EOPOA-86-05, April 10, 1986, § C.2, p. 13.

[19] Id. § M.1. Section M of the Solicitation, "Evaluation Factors for Award," is reproduced as Appendix D to this Report.

> It is hard to imagine an environmental mediator being effective unless he or she has some expertise in the substance and the history of the issues at hand and, therefore, some understanding of the implications that various "process" choices have on the parties, e.g. in helping the affected interests decide how best to represent themselves, how to define the scope of issues to be negotiated, or what protocols to adopt. The stability both of the process and of a consensus agreement, if reached, is increased when the parties make these decisions in a well informed way.[21]

During negotiations leading up to contract award, the agencies (CEQ and EPA) took the position that inclusion of technical personnel on the regulatory negotiation team would not be acceptable. The rationale for the agencies' position was that while dispute resolution process skills are critical to the success of a negotiated rulemaking, technical expertise is not only unnecessary but, in some cases, counterproductive. Officials in charge of EPA's negotiated rulemaking project believe that if the negotiating group feels that it needs the assistance of a technical expert, the group itself should select that expert.

3. Summary

From the foregoing, it appears that during the experimental stages of ADR and negotiated rulemaking, agencies have sometimes opted for rather restrictive definitions of the qualifications required for neutrals. In some of the early regulatory negotiations, agencies have sought neutrals with a combination of skills that only very few individuals possess, including specific experience in facilitation of negotiated rulemakings and technical expertise in the subject matter of the rulemaking proceeding. In some cases, organizations have been able to respond to these demanding requirements through a "team approach," in which the skills of dispute resolution personnel and technical experts are combined. The agency that has the most experience in regulatory negotiation, the EPA, has consciously eschewed technical expertise as a criterion for selection of neutrals and has emphasized generic dispute resolution skills as the controlling factor.

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[20] Conservation Foundation, Technical Proposal EOPOA-86-05 -- Regulatory Negotiation Support Services, May 28, 1986, p. 7.

[21] Id.

In the case of the Corps of Engineers minitrial program, the Corps has consciously selected neutral advisors who are both "truly neutral" and expert in government contracts law applicable to the disputes. One goal of this approach is to isolate the minitrial process from political criticism at the early stages of its development. As the program progresses and the use of minitrials becomes more routine, the qualifications may be loosened, thus broadening the pool of available neutrals.

C. Qualifications Required by Government Dispute Resolution Agencies

1. Federal Mediation and Conciliation Service

The basic statutory charter of FMCS is set forth in Section 203 of the Labor-Management Relations Act of 1947:

> It shall be the duty of the Service, in order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, to assist parties to labor disputes in industries affecting commerce to settle such disputes through conciliation and mediation.[22]

FMCS employs approximately 240 mediators, stationed at 75 separate locations. The basic qualification for employment as an FMCS mediator is seven years experience in collective bargaining and/or labor-management relations. FMCS operates an intensive in-house training program for its mediators.

2. Community Relations Service

The function of the Community Relations Service ("CRS") is:

> To provide assistance to communities and persons therein in resolving disputes, disagreements, or difficulties relating to discriminatory practices based on race, color, or national origin which impair the rights of persons in such communities under the Constitution or laws of the United States or which affect or may affect interstate commerce.[23]

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[22] 29 U.S.C. § 173. Under the Health Care Amendments of 1974, FMCS is authorized to provide conciliation services to avert or minimize work stoppages in the health care industry. 29 U.S.C. § 183.

[23] 42 U.S.C. § 2000g-1.

CRS employs a total of 60 to 70 "conciliators" in its ten regional offices. There are no specified qualifications for entry-level conciliators, and most of the training is on-the-job.

D. Rosters Maintained By Private Organizations

1. American Arbitration Association ("AAA")

The AAA maintains panels from which arbitrators may be chosen by parties who have agreed to arbitrate a dispute or disputes. The AAA has established separate panels of arbitrators for use in various types of commercial disputes. For example, for disputes arising under construction contracts, the AAA maintains a Construction Industry Panel. Members of the Construction Industry Panel are persons recommended by the National Construction Industry Arbitration Committee as "qualified to serve by virtue of their experience in the construction field."[24]

Federal agencies have from time to time used the AAA as a resource in establishing arbitration programs. For example, under the terms of the Superfund Statute, disputes arising out of claims against the fund are resolved by a Board of Arbitrators appointed by the President.[25] The Act provides that each member of the Board "shall be selected through utilization of the procedures of the American Arbitration Association."[26]

The Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") authorizes the Environmental Protection Agency to use research data submitted by one manufacturer to register pesticides submitted by another manufacturer. The Act further provides that a manufacturer who depends upon data submitted by another firm to obtain registration must compensate that other firm, and that any disputes over the amount of compensation will be resolved through binding arbitration under the auspices of FMCS.[27] The statute requires that FMCS appoint an arbitrator from a roster of arbitrators maintained by the Service, and that the procedures and rules of the Service shall be applicable. In turn, FMCS regulations have adopted the roster of arbitrators maintained by the AAA to resolve FIFRA compensation disputes and have designated that the AAA rules and procedures shall be used.[28] The Supreme

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[24] American Arbitration Association, Construction Industry Arbitration Rules (January 1, 1986) at 3.

[25] Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9612(4)(A).

[26] Id.

[27] FIFRA, § 3(c)(1)(D)(ii), 7 U.S.C. § 136a(C)(1)(D)(ii).

[28] 29 C.F.R. § 1440.1.

Court upheld the FIFRA arbitration provision against constitutional challenge in Thomas v. Union Carbide Agricultural Products Co.[29]

2. Center for Public Resources ("CPR")

CPR is a private non-profit organization that is devoted to promoting the use of ADR to resolve commercial disputes, as well as disputes between private parties and the government. In furtherance of this purpose, CPR maintains a list of distinguished persons who are available to serve as mediators, arbitrators, or neutral advisors in resolving disputes through ADR. The CPR roster is a blue ribbon group consisting largely of retired federal judges, former cabinet officers, and other dignitaries.

E. Conclusion

Because the substantive and procedural aspects of ADR vary significantly from case to case, it would be virtually impossible to develop a generalized set of qualifications applicable to all dispute resolution proceedings. Rather, agencies will need to take a practical approach to the selection of neutrals, balancing the demands of the specific ADR proceeding against the long-range need to develop a broader base of experienced neutrals from which to draw. While the diversity of proceedings makes specific advice hazardous, certain general guidelines can be gleaned from agency experience to date:

(1) Generic dispute resolution skills are an important prerequisite in most cases; insistence upon specific experience in the ADR process being pursued, however, many unnecessarily exclude persons whose general mediation skills are transferable to other contexts.

(2) Familiarity with the applicable statutory and regulatory scheme is generally desirable, particularly in negotiated rulemaking.

(3) Technical expertise should be required only when the substantive issues are so complex that the neutral could not effectively understand and communicate the parties' positions without in-depth technical knowledge.

(4) Avoiding conflicts of interest is important, but requiring "absolute neutrality" may unduly restrict the field of potential neutrals to retired judges or university professors.

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[29] ___ U.S. ___, 105 S.Ct. 3325 (1985).

III.

PROCUREMENT ISSUES

A. The Federal Acquisition System

In some circumstances, it may be possible for agencies to retain neutrals as experts, consultants, or special employees.[30] In most cases, however, neutrals' services must be acquired through contracting with the private individual or organization.

Federal procurement of goods and services is a highly regulated form of contracting. The principal statutes are the Armed Services Procurement Act,[31] which governs military procurements, and the Federal Property and Administrative Services Act of 1949,[32] which governs procurements by civilian agencies. These statutes have undergone substantial revision in recent years, principally by the Competition in Contracting Act of 1984 ("CICA").[33] CICA mandates that as a general rule, federal agencies conducting a procurement for property or services "shall obtain full and open competition through the use of competitive procedures . . . ."[34] Prior to CICA, the Armed Services Procurement Act and Federal Property and Administrative Services Act expressed a preference for formally advertised procurements, in which competitors submit sealed bids and the lowest "responsive and responsible" bidder wins the contract. The prior statutes provided that agencies could negotiate a contract rather than engage in formal advertising if one of 17 exceptions were present; one of those exceptions was contracts for "personal or professional services."[35]

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[30] See discussion in Section III.D.4., infra.

[31] 10 U.S.C. § 2201 et seq (1982), as amended by Pub. L. No. 98-369, Title VII, 98 Stat. 1175.

[32] 41 U.S.C. § 251 et seq (1982), as amended by Pub. L. No. 98-369, Title VII, 98 Stat. 1175.

[33] Pub. L. No. 98-369, Title VII, 98 Stat. 1175. Other major procurement reform statutes of recent vintage include the Small Business and Federal Procurement Competition Enhancement Act of 1984, Pub. L. No. 98-577, and the Defense Procurement Reform Act of 1984, Pub. L. No. 98-525.

[34] Id., § 303(a)(1).

[35] Armed Services Procurement Act, 10 U.S.C. § 2304(a)(4) (1982).

CICA mandates full and open competition in any form, whether it be by formal advertising or negotiation.[16] The Act further provides that agencies may use procedures other than competition only when one of seven specific exceptions exists. These exceptions include situations when "the property or services needed by the executive agencies are available from only one responsible source and no other type of property or services will satisfy the needs of the executive agency . . ." or "the executive agency's need for the property or services is of such an unusual and compelling urgency that the government would be seriously injured unless the executive agency is permitted to limit the number of sources from which it solicits bids or proposals . . . ."[17] Procurements under one of the seven exceptions to competition are referred to as "sole source." CICA eliminated the former exception for procurements of personal and professional services.

Under the Office of Federal Procurement Policy Act,[18] both military and civilian agency procurements are governed by a unified regulatory system, the Federal Acquisition Regulation (FAR").[19] The FAR sets forth detailed procedures for conducting federal agency procurements. For procurements over $10,000, agencies generally must publish a synopsis of the proposed procurement in the Commerce Business Daily ("CBD") at least 15 days in advance of issuing the solicitation.[40] After the CBD synopsis, agencies must allow at least 30 days response time for receipt of bids or proposals.[41] The agency's evaluations of bids or proposals usually takes a minimum of 30 days, although no minimum time is specified in the regulation. Thus, a competitive procurement under the procedures specified by FAR can be expected to take a minimum of two to three months.

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[16] CICA now refers to formal advertising as "sealed bids." Under the statute, sealed bids are appropriate in the following circumstances:

(i) time permits the solicitation, submission, and evaluation of sealed bids;

(ii) the award will be made on the basis of price and other factors;

(iii) it is not necessary to conduct discussions with the responding sources about their bids; and

(iv) there is a reasonable expectation of receiving more than one sealed bid.

41 U.S.C. § 253(a)(2)(A); 10 U.S.C. § 2304(a)(2)(A). See also, 48 C.F.R. § 6.401(a)(1)-(4).

[17] Id., § 303(c)(1) & (2).

[18] 41 U.S.C. § 405(a).

[19] 48 C.F.R., Chapter 1, Parts 1-53. Each agency has promulgated supplements to the FAR to deal with that agency's unique acquisition problems. See, e.g., DOD FAR Supplement, 48 C.F.R. Chapter 2.

The FAR also specifies procedures for sole source procurements -- that is, non-competitive procurements conducted under one of the seven exceptions established by CICA. In order to conduct a sole source procurement, the agency's contracting officer must provide a written justification for negotiating with only one source and must obtain the approval of his superiors in the procurement chain, at an increasingly higher level depending upon the size of the procurement.[42] The justification must contain, among other things, an identification of the statutory authority for proceeding on a basis other than full and open competition; a demonstration that "the proposed contractor's unique qualifications or the nature of the acquisition requires use of the authority cited;" a description of efforts made to ensure solicitation of offers "from as many potential sources as practicable;" and a determination that the anticipated cost of the government will be "fair and reasonable."[43] In addition, the contracting officer must conduct a "market survey" to determine whether other qualified sources capable of satisfying the government's requirement exists.[44] The written justification for a sole source procurement is public information that is available for inspection by disappointed bidders, among others.[45]

The competitive requirements of CICA are enforceable through a number of different actions available to disappointed bidders or offerors. An interested party who alleges a violation of a procurement statute or regulation may file a protest with the Comptroller General.[46] When such a protest is filed, the agency must suspend award or performance of the contract until the protest has been decided, unless the head of the agency finds that award or performance is warranted because of "urgent and compelling circumstances."[47] For procurements of automatic data processing equipment, such protests, with similar suspension provisions, may be filed with the General Services Board of Contract Appeals.[48] In addition, under the Federal Court Improvements Act of 1982, disappointed bidders or offerors may seek to enjoin award of a contract allegedly tainted by illegal action by filing suit in the U.S. Claims Court.[49] Traditionally, federal district courts have also entertained suits to enjoin the award or performance of federal contracts when the agency allegedly violated its mandate to promote full and open competition.[50]

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[40] 48 C.F.R. § 5.201(a) and § 5.203(a). The requirement for a CBD synopsis is imposed by the Small Business Act, 15 U.S.C. § 637(c) and the Office of Federal Procurement Policy Act, 41 U.S.C. § 416. The Continuing Resolution for Appropriations FY1987 contains an exemption for solicitations between $10,000 and $25,000 when the agency reasonably expects to receive at least two offers from responsive and responsible offerors. Pub. L. No. 99-500, October 18, 1986, Title IX, Section 922.

[41] 48 C.F.R. § 5.204(b).

[42] 48 C.F.R. §§ 6.303-2, 6.304.

[43] 48 C.F.R. § 6.303-2(a).

[44] 48 C.F.R. §§ 6.303-2(a)(8), 7.101.

[45] 48 C.F.R. § 6.305(1).

B. Issues in Contracting for Neutrals' Services

The overriding requirement of free and open competition, together with the detailed acquisition procedures prescribed by the FAR, raise a number of issues when agencies seek to acquire the services of neutrals. The first and most obvious issue is time. For any procurement over $10,000, a notice of the solicitation must be placed in the CBD, the agency must wait 15 days before issuing the solicitation, and 30 days must pass before bids or offers can be received. When the time for evaluating proposals is added, the process consumes a minimum of two to three months. Practically speaking, most fully competitive negotiated procurements take several months. In the case of the competitive procurement for convening and facilitating services conducted by the Department of Interior in connection with the California Outer Continental Shelf rulemaking, the entire procurement process, from development of the terms of the solicitation through the award of the contract, took over a year.

The protracted nature of the standard procurement process is often inconsistent with the goals of ADR and negotiated rulemaking. The very purpose of ADR is to avoid the delays inherent in the normal litigation process. Introducing several months of delay while the services of a neutral are procured could be viewed as self-defeating. Similarly, a lengthy acquisition process for the convenor or facilitator may be unacceptable when an agency is seeking to expedite the development of rules affecting the environment or health and safety.

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[46] 31 U.S.C. § 3552.

[47] 31 U.S.C. § 3553.

[48] 40 U.S.C. § 759(h).

[49] 28 U.S.C. § 1491(a)(3).

[50] See, Control Data Corporation v. Baldrige, 655 F.2d 283 (D.C. Cir.), cert. denied, 454 U.S. 881 (1981); Merriam v. Kunzig, 476 F.2d 1233 (3rd Cir.), cert. denied, 414 U.S. 911 (1973); Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970).

A second problem is that, as discussed above, the requirement of "full and open competition" may be inconsistent with the agency's need to acquire the services of a neutral who meets a number of specific criteria. Particularly at the formative stages of ADR and negotiated rulemaking, there are only a handful of individuals and organizations that have the combination of specific experience in the procedure plus technical expertise in the substantive issues. To the extent such qualities are important to successful resolution of the issue, the field of available neutrals may be very limited, until further experience results a development of a broader base. In the case of neutral advisors for minitrials, the fact that the neutral is generally selected by agreement between the private party and the government may mean that there is only one "qualified source." Yet the market surveys, sole source determinations, and gamut of agency approvals required by Parts 6 and 7 of the FAR may make it difficult for an agency to proceed on a sole source basis in a timely fashion.[51]

A third issue arises with respect to the consideration of price in the evaluation of proposals. CICA mandates that the contract will be awarded to the "responsible source whose proposal was most advantageous to the United States, considering only price and the other factors included in the solicitation."[52] One of the principal purposes of full and open competition is to obtain the lowest available price for the federal government.[53] The requirement of some form of price competition may be inconsistent with the need to obtain the services of neutrals who have the requisite experience and reputation, as well as the neutrality, to gain the confidence of the parties and bring delicate negotiations to a satisfactory conclusion.[54] The FAR is at least of some help in this regard because it recognizes that price competition may not be appropriate in certain circumstances, including acquisitions of "professional services":

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[51] In addition, the Comptroller General has stated that sole source procurements under CICA will be closely scrutinized. Daniel H. Wagner Associates, Inc., B-220633, 86-1 CPD ¶ 166 (Feb. 18, 1986); WSI Corp., B-220025, 85-2 CPD ¶ 626 (Dec. 4, 1985).

[52] Pub. L. No. 98-369, § 2711(d)(4), 41 U.S.C. § 253(b)(d)(4).

[53] See Control Data Corporation v. Baldrige, supra note 50, 655 F.2d at 295.

> While the lowest price or lowest total cost to the Government is properly the deciding factor in many source selections, in certain acquisitions the Government may select the source whose proposal offers the greatest value to the Government in terms of performance and other factors. This may be the case, for example, in the acquisition of research and development or professional services, or when cost-reimbursement contracting is anticipated.[55]

Finally, some of those contacted in connection with this study expressed concern that the services of neutrals could be considered "personal services." As a general rule, the government must secure personal services through employment rather than contract. Agencies are not permitted to award personal services contracts in the absence of specific statutory authorization.[56] These restrictions do not appear to be a significant concern under the regulatory definition of "non-personal services contract":

> [A] contract in which the personnel rendering services are not subject, either by the contract's terms or by the manner of its administration, to the supervision and control usually prevailing in relationships between the Government and its employees.[57]

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[54] Acquisition of the services of neutrals is at least roughly parallel to procurement of architect/engineer services, which is governed by the Brooks Act. 40 U.S.C. §§ 541-44. The Brooks Act provides that "the agency head shall negotiate a contract with the highest qualified firm for architectural and engineering services at compensation which the agency head determines is fair and reasonable to the Government." 40 U.S.C. § 544(a) (emphasis added).

[55] 48 C.F.R. § 15.605(c).

[56] 48 C.F.R. § 37.104(a), (b).

[57] 48 C.F.R. § 37.101.

Since neutrals by definition act independently and are subject to no one's supervision, their services can generally be regarded as "non-personal."[58]

C. Case Studies

1. Corps of Engineers Minitrials

The minitrial has several distinctive features that dictate the procurement procedures to be followed. First, a minitrial is by definition an extremely abbreviated hearing before senior executives of the two parties and the neutral advisor, if one is employed. Under the Corps' model minitrial agreement, the proceeding is scheduled to last two days, with a limited period for negotiating a settlement thereafter.[59] Second, the government and the private party to the dispute generally share the cost of the neutral advisor's services.[60] Third, the agency and the private party must agree on the selection of the neutral.

Given the first two factors (the abbreviated nature of the minitrial and equal sharing of costs by the private parties), acquisition of the services of the neutral advisor should seldom if ever cost the government more than $10,000, at least at current prices. This means that some of the formalities of the procurement process can be dispensed with. Procurements under $10,000 need not be advertised in the CBD.[61] In addition, the low-dollar amount of neutral advisor acquisitions means that agencies can avail themselves of the small purchase procedures (under $25,000) of FAR Part 13.1. These procedures allow the agencies to procure on a more informal basis, such as soliciting quotations orally rather than through a formal request for proposals. The Corps used the small purchase procedures, without a CBD announcement, in acquiring the services of neutral advisors for both of its prior minitrials. The Department of the Navy used the same procedure in retaining a neutral advisor for its minitrial of a cost allowability dispute.

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[58] See 61 Comp. Gen. 69, 72-74 (1981) (agency authorized to contract for legal services because law firm acted as an independent contractor and was not subject to agency supervision).

[59] Engineer Circular No. 27-1-3 at A-8. The first Corps minitrial required two days of hearings while the second lasted approximately three days. See Army Engineers Succeed in First Minitrial, Alternatives to the High Cost of Litigation, Center for Public Resources, vol. 3, no. 3 at 1 (March 1985); Ruttinger, Army Corps of Engineers Settles $45 Million Claim at Minitrial, Alternatives to the High Cost of Litigation, Center for Public Resources, vol. 3, no. 8 at 1 (August 1985).

[60] Engineer Circular No. 27-1-3 at A-4, ¶ 6.

[61] 48 C.F.R. § 5.201(a).

2. Department of Interior OCS Negotiated Rulemaking

As noted above, the Department of Interior used full competitive procedures to acquire convening/facilitating services for regulatory negotiation of environmental rules applicable to the California OCS development. This involved the development and issuance of a 62-page request for proposals, which detailed the nature and scope of the services to be provided as well as the evaluation factors for award. An announcement of the solicitation was published in advance in the CBD. Seven firms submitted offers on the solicitation, followed by detailed evaluation and negotiations. Ultimately, a cost-reimbursement type contract was awarded to the Mediation Institute of Seattle, Washington.

The evaluation factors for award in the solicitation focused upon the experience and technical expertise of the offerors. Points were assigned to each of the five separate categories, comprising experience (30 points), understanding of the problem (25 points), dispute resolution skills (25 points), technical approach (10 points), and personnel staffing (10 points). No numerical weight was assigned to the cost proposal. The solicitation stated as follows:

> In evaluating proposals for a cost reimbursement type contract, estimated costs of contract performance and proposed fees will not be considered as controlling factors, since in this type of contract advance estimates of costs may not provide valid indicators of final actual costs. There is no requirement that cost reimbursement type contracts be awarded on the basis of either (a) the lowest proposed cost, (b) the lowest proposed fee, or (c) the lowest total estimated cost plus proposed fee.62/

The solicitation went on to state that the cost proposal was required to reflect a "realistic and reasonable approach" to the contract.

62/ Solicitation No. 3292, § M-3, pp. 66-62. See 48 C.F.R. § 15.605(d).

3. CEQ Procurement of Regulatory Negotiating Services

a. Historical Background

EPA has been one of the most active agencies in promoting regulatory negotiation. EPA has several "reg negs" in process and has used the procedure to complete two sets of regulations: nonconformance penalties under Section 206(g) of the Clean Air Act and pesticide exemptions under Section 18 of the FIFRA.[63] In the case of the nonconformance penalties rulemaking, EPA employed the services of ERM-McGlennon Associates as the convenor/facilitator.[64] In the second rulemaking, regarding pesticide exemptions, ERM-McGlennon Associates was used as the convenor, but the facilitator was an employee of EPA's Office of General Counsel. In acquiring the services of the outside convenor/facilitator, EPA utilized a basic ordering agreement, which is a form of contracting described in FAR Subpart 16.7.

b. The CEQ Procurement

In April 1986, CEQ undertook to acquire convening, facilitating and related services for use by EPA in its ongoing regulatory negotiation project, and by other agencies interested in launching similar projects. CEQ did so pursuant to its statutory role as a clearinghouse for hiring experts and consultants in furtherance of environment policy.[65] The procurement was conducted by a contracting officer for the Executive Office of the President ("EOP"). The EOP synopsized the solicitation in the CBD, and received some 200 requests for the RFP. Ultimately, however, only four organizations submitted offers.

The RFP solicited proposals on seven different categories of convening, facilitating, and related services.[66] The RFP contemplated the award of one or more indefinite quantity contracts for a one-year period, plus two option years. Under the terms of the RFP, the agency could have awarded separate contracts for each of the seven different types of services. In fact, one contract was awarded for six categories of services to the Conservation Foundation, a nonprofit environmental research organization, and a separate contract for the seventh category was awarded to the

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[63] See Perritt, Analysis of Four Negotiated Rulemaking Efforts, 1985 Recommendations and Reports of the Administrative Conference 637, 726-745.

[64] Mr. McGlennon was an experienced environmental mediator and former administrator of EPA Region 1.

[65] 42 U.S.C. § 4343.

[66] These services included convening, facilitating, documenting, resource support, analytic support, and training.

National Institute for Dispute Resolution ("NIDR"). While the RFP described the regulatory negotiation project as arising out of the program initiated by EPA, the terms of the RFP made clear that the services being procured were for the purpose of assisting EPA, the Office of Environmental Quality ("OEQ") and "other participating agencies" with joint projects in regulatory negotiations.

c. The Request for Proposals

Under the terms of the RFP, offerors were to propose a roster of professionals who would be available to perform the various services called for under the contract. These categories included "professional," defined as convenors, facilitators, analysts, and trainers, and "administrative personnel," defined as documentors, direct support staff, resource support staff, and management/clerical positions. For each category and subcategory of personnel, the offeror was to propose a base period hourly rate, and rates for the first and second options under the contract. The offerors were also required to propose percentage ceiling rates for such items as fringe benefits, overhead, general and administrative expense, and profit/fee. As required by the regulations governing indefinite quantity contracts,[67] the RFP specified a minimum order quantity of $5,000 and maximum of $175,000.

The evaluation section of the RFP made it clear that each of the seven discrete categories of services (i.e., convening, facilitating, document support, etc.) would be evaluated separately. The EOP reserved the right to award separate contracts for each category or more than one contract for a given category. The evaluation factors were stated as follows:

> The Technical proposals will be evaluated according to the offeror's understanding of the requirements of the Solicitation and the availability of an appropriate disciplinary mix of environmental scientists and technicians to accomplish tasks required under the scope of work . . . . The Technical Proposal will also be rated as to the approach, methodology, and accuracy of Work Plan for the Benchmark Task Order.
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> The Cost Proposal will be evaluated according to the relative costs set forth in the tables prepared in accordance with Section B of the RFP.[68]

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[67] 48 C.F.R. §16.504(a)(1).

[68] Solicitation No. EOPOA-86-05, § M.1, p. 85.

The RFP contained a "benchmark task order" describing a hypothetical EPA negotiated rulemaking[69] Each offeror was required to submit a work plan outlining the offeror's proposed approach, staffing, management plan, and schedule for this hypothetical task order.

Under the terms of the indefinite quantity contract, work is commissioned on particular regulatory negotiations through the issuance of task orders. The task order defines the scope of the work required, the estimated period of performance, and the estimated level of effort.[70] Within the time period specified in each task order (expected to be a week or two), the contractor is required to submit a proposed work plan outlining the contractor's objectives, approach, statement of work, deliverables, staffing arrangements, management plan, schedule, and cost/price assumptions.[71] The contractor is also required to submit a separate cost analysis providing a breakdown of costs and specifying the type of contract desired, i.e., firm fixed-price, cost plus fixed-fee, or labor hour. It is contemplated that the agency can negotiate with the contractor regarding each aspect of the work plan, including the personnel who are proposed. The RFP specifically states that the government reserves the right "to award the task orders in any order, or not to award."[72]

In the eyes of the EOP, CEQ, and EPA, the principal advantage to this indefinite quantity contract is its flexibility. Rather than having to go through a fully competitive process for each and every regulatory negotiation, the EOP conducted a competitive procurement for the initial indefinite quantity contract. Under the terms of the contract, task orders can be issued and negotiated with the contractor for each separate rulemaking within a matter of weeks, thus shortening the period required to engage the services of a convenor or facilitator. By engaging groups like the Conservation Federation and National Institute for Dispute Resolution, CEQ, EPA, and other agencies have ready access to the rosters of experienced professionals that those groups have retained as employees or subcontractors.

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[69] The Benchmark Task Order is reproduced as Appendix E to this Report.

[70] Solicitation No. EOPOA-86-05, § H.9, p. 27.

[71] The Benchmark Task Order in the RFP states that a firm fixed-price order is anticipated.

[72] Solicitation No. EOPOA-86-05, § H.9, p. 28.

4. Use of Government "Neutrals"

Another possibility for obtaining services of neutrals is to utilize government personnel. This has been done in at least two cases: the FAA negotiated rulemaking regarding flight and duty time for aircraft crews and the EPA's regulatory negotiation regarding pesticide exemptions. In the former case, a mediator from FMCS was employed as the convenor/facilitator; in the latter case, an employee from the EPA's Office of General Counsel was used. In addition, OSHA is now undertaking its second negotiated rulemaking with the intent of using an FMCS mediator.[13]

D. Evaluation of Techniques

1. Full Competitive Procurement

The most straightforward approach to acquiring the services of a neutral is that utilized by the Department of Interior for the California OCS rulemaking. The agency conducted an open competition for the contract in which seven offerors submitted proposals. The agency also ensured that a qualified source would be selected by specifying detailed technical evaluation factors, and making these technical factors the exclusive basis for evaluation of the proposals. By obtaining cost proposals but not making cost an evaluated factor, the agency avoided potential problems inherent in selecting a provider of professional services on the basis of cost rather than professional experience or expertise.

However, the principal disadvantage of a fully competitive procurement is the time and effort required, which in most cases make full competition impractical for an individual dispute resolution or regulatory negotiation. From start to finish, the Interior Department procurement of convening and facilitating services took over a year. The successful offeror submitted a detailed, two-volume proposal that took months to prepare and was estimated to cost several thousand dollars. Thus, while fully competitive procurements are the most desirable and compliant with statutory requirements, they may be impractical when time is of the essence.

2. Small Purchases

Use of the small purchase procedures provided for in FAR Subpart 13.1 should work for most procurements of neutral advisor services, and possibly in the case of small arbitrations and regulatory negotiations. As noted, in virtually all cases, contracts with minitrial neutral advisors should involve expenditure of under $10,000 by the government. Thus, no announcement in the CBD is required, and the streamlined procedures for small purchases can be utilized. In its two successful minitrials, the Corps of Engineers has contracted with the neutral advisor through a purchase order issued based upon an oral quotation. In each case, the purchase order was accompanied by a tripartite agreement among the neutral advisor, the government, and the private party to the dispute.[74]

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[13] In the past, agencies that have used FMCS mediators have paid a pro rata share of the mediator's salary through an inter-agency transfer of funds pursuant to the Economy Act, 31 U.S.C. § 1535.

Even for small purchases, however, agencies are required to obtain competition "to the maximum extent practicable."[75] Solicitations may be limited to one source only "if the contracting officer determines that only one source is reasonably available."[76] However, unlike the procedures specified in Parts 6 and 7 of the FAR for larger procurements, sole source purchases under the small purchase procedures do not require a written determination by the contracting officer or approvals by senior procurement officials. In the case of minitrial neutral advisors, sole source procurements should be justified on the basis of the need for prompt action to effect a settlement, the limitations on the number of qualified sources, and the fact that the selection of the neutral advisor must be approved in advance by the private party to the dispute.

Similar factors may control the hiring of arbitrators and mediators -- *i.e.*, joint selection and sharing of fees by the agency and private party to the dispute. In arbitrations or mediations of smaller disputes that take a few days to resolve, the small purchase procedures should be available for acquisition of the neutral's services.

3. Indefinite Quantity Contracts

As noted above, the indefinite quantity contract used by the CEQ to procure convening and facilitating services for the EPA and other agencies is a flexible procedure. Under the regulations, this type of contracting may be used when "the Government cannot predetermine . . . the precise quantities of supplies and services that will be required during the contract period . . . ."[77] --

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[74] A redacted copy of the Agreement for Services of Neutral Advisor utilized in one of the minitrials is reproduced in Appendix F hereto.

[75] 48 C.F.R. § 13.106(b)(1).

[76] *Id*.

[77] 48 C.F.R. § 16.504(b)(1). *See generally* Virden, *Indefinite Delivery Contracts*, Government Contractor Briefing Papers No. 78-2, Federal Publications (April 1978).

precisely the situation that may exist when an agency embarks upon a regulatory negotiation project. Full and open competition, as required by CICA and the procurement regulations, takes place in response to the RFP for the indefinite quantity contract. Once the contract has been awarded, acquisition of services for each separate regulatory negotiation is done through the task order/ work plan procedure described above. The contractor can respond to each task order much more quickly than if full competitive procedures were required for each separate rulemaking.

Use of the indefinite quantity contract for this purpose raises several issues. First, the regulations specify that such contracts should be used only for "commercial or commercial-type products."[78] "Commercial product" is defined as something that is "sold or traded to the general public in the course of normal business operations at prices based on established catalog or market prices . . . ."[79] A "commercial-type product" is a commercial product that has been modified to meet some peculiar requirement of the government. A case could presumably be made that the mediation-type services provided by convenors and facilitators are also sold or traded in the commerical market. It is less clear whether such services are sold "to the general public" at "established catalog or market prices". Since the "commercial product" restriction is not mandatory, however, it should not pose an insuperable barrier to the use of indefinite quantity contracts for ADR-related services.

Second, the regulations require that an indefinite quantity contract specify a "minimum quantity" of the item to be procured, and further that such minimum quantity must be more than a "nominal" amount.[80] This is necessary to avoid an illusory contract under which the government has no obligation to do anything in return for the contractor's agreement to fill orders.[81] In the regulatory negotiation and ADR context, it is obviously difficult to specify a minimum quantity of services to be procured. In a somewhat parallel context, the Court of Claims upheld an indefinite quantity contract for various categories of construction work where the "minimum quantity" specified in the contract was a payment of $5,000.[82]

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[78] 48 C.F.R. § 16.504(b).

[79] 48 C.F.R. § 11.001.

[80] 48 C.F.R. § 16.504(a)(2).

[81] See Mason v. United States, 615 F.2d 1343, 1346 n.5 (Ct. Cl. 1980), citing, Willard Sutherland & Co. v. United States, 262 U.S. 489, 493 (1923).

Third, the task order procedure specified in the RFP allows the agency and the contractor to negotiate the terms of each individual task order, including the personnel who will be assigned to a particular project and, presumably, the cost of those services. In the typical indefinite quantity contract for a commercial product sold at a catalog price, the agency issues an order for a given quantity and the contractor fills the order at the price specified in the contract. That price was, of course, established through competition for the initial contract. In the case of the EOP/CEQ procurement of convening and facilitating services, the mix of services, the personnel supplied to provide the services, and even the cost of the services (within the ceilings specified in the contract) are subject to negotiation for each individual task order. Both the government and the contractor have the right not to go forward with the particular task order if the detailed terms of the order and work plan cannot be agreed upon. This leaves the arrangement open to the criticism that each task order is in fact a separate procurement that should be conducted on a competitive basis, rather than through a de facto "sole source" process under the indefinite quantity contract.

A further problem in this regard may be that the service providers in each case are subcontractors to the organization that is performing the indefinite quantity contract. By allowing the agency and the contractor to negotiate the identity of the "subcontractor" for each separate task order, the indefinite quantity contract may in effect allow the agency to select a sole source for each separate regulatory negotiation without complying with the sole source justification procedures of the regulations.

These potential problems may be ameliorated by the fact that the material terms of each work plan -- including ceilings on cost and rates, identity of the service providers, and general approach and methodology -- were defined in the proposals submitted in response to the competitive RFP. So long as the parties adhere to those terms in negotiating individual task orders, sole source issues should be avoided.

In summary, the EOP/CEQ's use of indefinite quantity contracts is an imaginative application of an existing procurement techique to the peculiar needs of the regulatory negotiation setting.

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[82] Mason v. United States, supra note 81. See also, Hemet Valley Flying Service Co. v. United States, 7 Cl. Ct. 512 (1985) (indefinite quantity contracts for flying services upheld, although contract required no minimum purchase of services, because contractor was paid a dollar amount to maintain the availability of his aircraft for government use).

4. Other Potential Acquisition Techniques

a. Basic Ordering Agreements

Prior to the CEQ indefinite quantity contract, the EPA procured convening and facilitating services for its regulatory negotiation project through basic ordering agreements under FAR Subpart 16.7. A basic ordering agreement is not itself a contract, but rather an agreement specifying a product or service to be procured, the contract clauses that will apply to future contracts, and other terms and conditions as negotiated between the government and the contractor. The agreement contemplates that orders can be issued during the term of the agreement and that each such order will become a separate contract upon acceptance by the contractor. The basic ordering agreement is also required to specify a method for pricing future orders.

The basic ordering agreement theoretically eliminates some of the formal steps required in competitively procuring services of a convenor/facilitator for each negotiated rulemaking. By entering into such an agreement with a mediation/facilitation firm, EPA was able to issue orders for services as each new regulatory negotiation arose. However, use of basic ordering agreements became less attractive when recent revisions to the FAR required that, before issuing an order under a basic ordering agreement, a federal agency must obtain competition in accordance with Part 6 of the FAR.[83] This means that each order under a basic ordering agreement is, in effect, a separate competitive procurement subject to the same procedures and requirements as would apply to a new contract. Thus, some of the gains in efficiency previously achieved by using basic ordering agreements have been diminished.

b. Blanket Purchasing Agreements

Blanket purchasing agreements, which are not contracts, are the equivalent of government charge accounts with qualified sources of supply.[84] These are used for simplifying purchasing when a wide variety of items in a broad class of goods is generally purchased, but the exact items, quantities and delivery requirements are not known in advance and can be expected to vary widely, or where an agreement may avoid the necessity of writing a large number of purchase orders.[85] Blanket purchasing agreements are small purchase procedures and cannot cumulatively exceed the dollar limitations for small purchases ($25,000). Use of a blanket purchase agreement does not justify sole source purchases.[86]

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[83] 48 C.F.R. § 16.703(d)(1).

[84] 48 C.F.R. § 13.201(a).

[85] 48 C.F.R. § 13.203-1.

Such agreements do not appear to be especially useful as procedures for contracting with ADR neutrals. The dollar limitations are too low for regulatory negotiation (but could pay for individual arbitrators or minitrial neutrals), the services would not be the sort of standard, frequently purchased item contemplated by the regulations, and such an agreement is not a contract and could not be used to bind anyone to performance. Nor does the existence of a blanket purchase order remove the requirements for obtaining competition.[87]

c. Supply Schedules

The federal supply schedule program[88] provides agencies with a simplified process for acquiring commonly used supplies and services. Under a supply schedule, contractors agree to fill relatively small individual orders from agencies at price discounts normally available only with commercial volume purchases, in return for a promise by the government that certain agencies will obtain all of their requirements for the contract items by purchasing from the schedule. While one of the main purposes of the supply schedule program is to obtain this price advantage for the government, a second purpose is to provide a mechanism by which agencies can obtain goods and services for which there is a recurrent need without struggling through the rigors of the normal procurement process. The supply schedule mechanism, or the variant thereof, presents obvious possibilities for the acquisition of the services of mediators, facilitators, arbitrators, and perhaps other ADR professionals.

A supply schedule is maintained by an administering agency. Most existing schedules are managed by the General Services Administration, but other agencies can be authorized to administer schedules.[89] A supply schedule is often a multiple award[90] contract in which all offerors who meet the criteria for inclusion are placed on the schedule. Full competition is used to select qualified suppliers through an ordinary contracting process that may be by sealed bids or by proposals and negotiation,[91] as appropriate.

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[86] 48 C.F.R. § 13.204.

[87] See 48 C.F.R. § 16.703(d).

[88] FAR Subpart 38.1 specifies the salient legal characteristics of the contract device, and FAR Subpart 8.4 contains instructions for use by federal agencies in making purchases from a supply schedule. 48 C.F.R. Parts 8.4, 38.1.

One or more "mandatory" agencies are designated by the schedule administrator as being required to purchase all of their requirements for the included goods or services from schedule suppliers.[92] The designated agencies need not engage in competitive considerations,[93] but may obtain their needs by direct order from any schedule supplier. Exceptions to the mandatory purchase requirements are available, but do not provide much latitude to purchase non-schedule items. Urgent needs that cannot be filled by allowing a schedule contractor to accelerate the agreed-upon delivery terms can be obtained off-schedule.[94] If a mandatory agency finds a schedule item available from a non-schedule supplier at a lower price, then the agency can purchase off-schedule -- but only after obtaining full competition.[95]

Non-mandatory agencies, while not required to purchase from the schedule, have the option to do so at the specified schedule prices.[96] A schedule contractor is not required to fill orders from the non-mandatory agencies, but he is encouraged to do so.[97]

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[89] 48 C.F.R. § 38.101(e). The GSA must authorize another agency to award a schedule contract.

[90] A single award schedule is also possible (48 C.F.R. § 38.102-1), and, in fact, is the preferred mechanism (48 C.F.R. § 8.403-1).

[91] Multiple award schedules are always negotiated. 48 C.F.R. § 38.102-2(a).

[92] 48 C.F.R. § 38.101(b).

[93] In fact, competitive procedures, such as soliciting bids from schedule suppliers, is prohibited. 48 C.F.R. § 8.404(b).

[94] 48 C.F.R. § 8.404-1(a).

[95] 48 C.F.R. § 8.404-1(e).

[96] 48 C.F.R. § 38.101(c).

[97] 48 C.F.R. § 8.404-2(b).

If the contractor accepts an order from an optional agency, he must comply with the pricing and delivery terms of the schedule.[98]

Where more than one supplier qualifies under a multiple award, then no supplier is entitled to make any sales under the schedule, although the mandatory agencies are still bound to obtain their requirements from schedule suppliers. This entitles a schedule supplier to some relief in the event a mandatory agency illegally purchases "off-schedule" (which may include acquiring the schedule items from another government agency[99]).

In the context of ADR services, one salient feature of ordinary supply schedules may require modification. Under current rules, a qualifying offeror must agree to deliver services on the same terms (in particular, volume pricing discount schedules) as the offeror makes available to its best commercial customers. This appears to have little meaning in the ADR services situation, although a requirement that offerors quote rates equivalent to their commercial rates, if any, may be appropriate. This particular feature reportedly has caused many desirable firms to avoid supply schedule contracts, because of the possibility that they would be required to sell at high-volume prices, whereas they might have the opportunity to fill only low-volume orders.[100]

d. Hiring Neutrals as Consultants, Experts, or "Special" Government Employees

Several statutes authorize federal agencies to obtain the services of consultants or experts, either by hiring them as federal employees on a short-term or interim basis, or by contracting for their services.[101] The most important of these laws is 5 U.S.C. § 3109, which provides, in pertinent part:

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[98] Id.

[99] For example, the Department of Defense was held to have breached a requirements contract by ordering items covered by the contract from GSA. Inland Container v. United States, 206 Ct. Cl. 478, 512 F.2d 1073 (1975).

[100] See W. Goodrich & C. Mann, Avoid Disaster in Federal Supply Schedule Contracts, 15 Pub. Cont. L.J. 1 (1984) for a review of pitfalls facing supply schedule contractors.

[101] Examples: 5 U.S.C. § 575 (Administrative Conference); 7 U.S.C. § 1642 (Department of Agriculture, rate not to exceed $50 per day); 21 U.S.C. § 1116 (Food and Drug Administration, six persons may be so employed with no time limitations); 22 U.S.C. § 290(F) (Inter-American Foundation); 29 U.S.C. § 656 (Department of Labor, contracts may be renewed annually); 33 U.S.C. § 569A (Corps of Engineers); 40 U.S.C. § 758 (General Services Administration); 49 U.S.C. § 1657(B) (Department of Transportation, pay not to exceed $100 per day).

> When authorized by an appropriation or other statute, the head of an agency may procure by contract the temporary (not in excess of one year) or intermittent services of experts or consultants or an organization thereof, including stenographic reporting services. Services procured under this section are without regard to:
>
> (1) the provisions of this title governing appointment in the competitive service;
>
> (2) chapter 51 [civil service classifications] and subchapter iii of chapter 53 [pay] of this title; and
>
> (3) section 5 of title 41 [requirements for advertising of contracts] . . . .

Section 3109 confers on those agencies that have the appropriate authorization in an organic or appropriation statute[102] the ability to employ consultants or experts without regard to civil service competitive hiring restrictions. In the context of ADR neutrals, experts are of most interest here as a consultant serves primarily "as an advisor to an officer" but "neither performs nor supervises performance of operating functions."[103]

Agencies can retain experts and consultants on a full-time basis for only one year, although many of the authorizing statutes allow for annual renewals. Experts and consultants can be hired on an intermittent basis -- that is, from time to time, working up to 130 days in a year -- for an indefinite period.[104] The pay is set by the employing agency, and may be up to the rate of pay for level V of the Executive Service.[105] No retirement benefits are accorded, and, unless required by other statutes, no holidays or overtime are provided for. Employees in this category are "per diem" employees, even if their tour of duty is for one year.

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[102] The Department of Defense Authorization, for example, have been contained in the yearly DOD appropriations acts.

[103] 23 Comp. Gen. 497 (1944); Federal Personnel Manual ("FPM") 304-1-2(1).

[104] FPM 304-1-2(5), (6).

[105] 5 U.S.C. § 3109. Other limitations may apply under statutes that provide specific authorization. See note 101, supra.

The employment of experts and consultants could be used by an agency with an irregular need for ADR services. Professionals could be brought on board in a short time, without the need for either a full-blown procurement or a competitive civil service placement. If a requirement for many services can be foreseen, but their timing is liable to be sporadic, then the employees could be hired on an intermittent basis, providing services from time to time as necessary.[106]

There are several potential impediments to hiring ADR neutrals as special government employees. These impediments may be summarized as follows:

Conflicts of Interest. Employees hired under 5 U.S.C. § 3109 are subject to all statutory prohibitions on conflicts of interest, including ethical standards, financial disclosure, and post-employment restrictions on employment.[107] To the extent that an expert or consultant becomes subject to conflict-of-interest restrictions, his professional options after serving as a neutral could be constrained. For example, a consultant employed by EPA on an intermittent basis was excluded from bidding on an EPA contract relating to her area of expertise because, at the time of the contract bidding, she was still technically an employee of EPA. This result was reached even though the consultant had not actually accepted any work for the agency for a period of time prior to bidding.[108] In a recent case, the government was enjoined from proceeding with a contract awarded to a bidder who had been an employee of the government when he bid, but who resigned prior to the award.[109]

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[106] It is possible for a professional to maintain two or more intermittent positions with different agencies. See 5 U.S.C. § 5703. The Federal Personnel Manual states that, under an exception to the general restriction against being paid for more than one position for more than 40 hours per week, "an individual is entitled to pay for services on an intermittent basis from more than one consultant or expert position, provided the pay is not received for the same hours of the same day." FPM 304-6-1.

[107] FPM 304-1-9. Temporary or interim employees who serve less than 130 days per year may qualify for treatment as a "special government employee", and thereby will not be subject to all of the prohibitions that apply to regular employees. See FPM Chapter 735.

[108] Matter of Enarco, Inc., B-218106, 85-1 CPD ¶ 592 (May 23, 1985).

[109] Speakman Co. v. Weinberger, (unpublished, D.D.C.), CCH Government Contracts Reports ¶ 74,539 (October 2, 1986).

Pay Limitations. Compensation for experts and consultants who are hired under Section 3109 is limited to the rate of pay for level V of the Executive Service. The daily rate may therefore be considerably less than a highly qualified neutral could command in the commercial market. Moreover, specific authorizing statutes for some agencies limit the compensation for temporary experts and consultants to very low levels; for example, the rate of compensation for Department of Agriculture experts is limited to $50 per day.[110] Thus, some qualified potential ADR neutrals may be unwilling to offer their services to government agencies if their compensation is limited to an arbitrarily low level.

Requirement to Follow Procurement Procedures. As noted above, hiring a neutral through Section 3109 obviates competitive civil service requirements. Section 3109 also exempts such hirings from the requirements of 41 U.S.C. § 5, which requires that all procurements of contracts for supplies or services in excess of $10,000 be publically advertised. However, the Comptroller General has held that this exemption

> does not relieve an agency from the necessity of satisfying all of the other applicable requirements imposed by the Federal Property and Administrative Services Act of 1949 . . . and the Federal Procurement Regulations . . . on Government contracts for goods or nonpersonal services.[111]

Thus, it is not at all clear that hiring ADR neutrals as special government employees is any more efficient than utilizing procurement techniques discussed above.

e. Innovations in Procedures

Contracting for services for multiple proceedings (especially in the case of indefinite quantity contracts) can encounter procedural requirements in the Federal Acquisition Regulation that simply do not conform to the needs of the agencies. Subpart 1.4

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[110] 7 U.S.C. § 1642.

[111] 61 Comp. Gen. 69, 78 (1981) (citations omitted).

of FAR contains the kernel that may provide the solution to this situation:[112]

> Unless precluded by law, executive order, or regulation, deviations from the FAR may be granted as specified in this subpart when necessary to meet the specified needs and requirements of each agency. The development and testing of new techiques and methods of acquisition should not be stifled simply because such action would require a FAR deviation. The fact that deviation authority is required should not, of itself, deter agencies in their development and testing of new techniques and acquisition methods . . . .[113]

While statutory requirements cannot be waived, the FAR itself points the way toward its own adjustment. Many specifications for contract devices, such as supply schedules and indefinite quantity contracts, were not established by statute, but rather developed over the years largely through experience and adjudication; it is these structural devices that are susceptible of modification.

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[112] 48 C.F.R. § 1.402.

[113] Revisions to the Federal Acquisition Regulations are prepared and issued through the coordinated action of the Civilian Agency Acquisition Council (composed of representatives of the civilian executive departments and EPA, the Small Business Administration, and the Veterans Administration) and the Defense Acquisition Regulatory Council (representatives of military departments, the Defense Logistics Agency, and NASA). 48 C.F.R. § 1.201-1. Notice and comment rulemaking is used when the revision is "significant". 48 C.F.R. § 1.501.2.

Deviations from the FAR are permitted "when necessary to meet the specific needs and requirements" of an agency, and require authorization by specified agency officials. 48 C.F.R. § 1.402. Deviations for a single contracting action require the agency head or a delegee to authorize the deviation and to furnish the FAR Secretariat with a copy of the authorization. 48 C.F.R. § 1.403. Deviations for a class of civilian contracting actions require that the appropriate agency official first consult with the Civilian Agency Acquisition Council. 48 C.F.R. § 1.404(a)(1). When an agency perceives the need for a class deviation on a permanent basis, the agency must submit a proposed FAR revision to the FAR Secretariat for consideration by the pertinent FAR Council(s). 48 C.F.R. § 1.404(a)(2). Deviations for defense agencies and NASA are subject to slightly different requirements.

5. Use of Government Neutrals

Using employees of the federal government as neutrals has several advantages. First, assuming the immediate availability of a qualified government neutral, the delays inherent in the procurement process described above may be avoided. Second, using government employees presumably spares the government the additional expense of paying outside neutrals.[114] Third, to the extent that the use of private parties as "neutrals" creates constitutional issues under the "delegation doctrine" (See § IV infra), those issues are presumably avoided, or at least substantially reduced, when government employees perform the neutral function. Finally, there may be a long-term advantage to the extent that as government employees become expert in acting as neutral advisors, arbitrators, or convenors/facilitators, the process of institutionalizing ADR and regulatory negotiation within the government will be enhanced.

Potential limitations on the use of government employees as neutrals are: first, private parties to disputes may not view government employees as truly neutral; and second, the most logical providers of neutral services, such as FMCS and CRS, may be inhibited by their statutory charter[115] and/or manpower limitations from providing such services on a regular basis.

E. Long-Term Structural Issues

As discussed above, use of state-of-the-art ADR techniques and regulatory negotiation by federal agencies is still in an experimental or formative stage. The experience of agencies is limited, and many agencies are sensitive to potential political criticism of their use of newly developed negotiation techniques.

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[114] However, an agency may be required to compensate the FMCS, for example, for the services of one of its mediators through an inter-agency transfer of funds. See 31 U.S.C. § 1535. Some have argued that if one considers the fully allocated cost of a government employee's time, including salary and overhead, use of a government neutral may be more costly than contracting with an outsider.

[115] FMCS is authorized to conciliate labor disputes (29 U.S.C. § 173), while the CRS is charged with mediating community disputes relating to discrimination on the basis of race, color, or national origin. As in the past, FMCS or CRS could in effect loan an employee to another agency for a limited period to assist in an ADR or reg neg proceeding. See discussion in Section III.C.4 above. But the agencies' statutory charters would probably prevent them from establishing an ongoing ADR neutrals services for other federal agencies without specific congressional authorization.

The dilemma created by these factors is that the growth of these ADR techniques and regulatory negotiation may be limited by the shortage of experienced neutrals in the private sector; if agencies do not expand their use of such techniques, however, the pool of experienced neutrals cannot expand.

Thus, agencies must respond to the long-term need to develop a broader base of expertise upon which to draw for neutral services. Expansion of the talent pool could occur through several processes:

Less stringent criteria for selection. The Corps of Engineers has conceded that it is more sensitive about the selection of neutral advisors for its minitrials during the developmental stage, when the process is potentially subject to greater scrutiny by higher officials in the agency and/or Congress. As the program gains acceptance over time and becomes more part of the Corps' routine procedures, its visibility will be reduced. At that point, the Corps believes it may loosen its criteria for selection to broaden the base of available neutrals.

Training mechanisms. The proposal submitted by NIDR on the EOP/CEQ regulatory negotiation procurement provided that each negotiation would be staffed by at least two convening/facilitating professionals. One purpose of this staffing was to allow the senior professional to train his colleague in the process, thus giving the junior professional the experience needed to perform convening or facilitating services for future regulatory negotiations. While such a "team" approach may involve some short-term costs, it may be beneficial in the long run in developing a broader cadre of trained professionals available to the agencies.

Government neutrals. Both the FMCS and CRS were created in response to a specific need for mediation services within the government. By expanding the authority of FMCS, CRS, or other agencies, or creating a new "neutrals" service organization within the government, agencies' ability to expand their use of ADR and regulatory negotiation techniques would be enhanced.[116]

Government Roster of Neutrals. Another device for expanding the availability of qualified neutrals would be to assign a single agency, such as ACUS, to maintain a roster of qualified neutrals from which other agencies could draw. Private individuals and organizations who wished to be listed on the roster would submit applications specifying educational background, experience, and techical expertise, if any. The central agency could also collect feedback on those neutrals who were actually employeed by agencies for ADR or regulatory negotiation. The establishment and maintenance of such a roster could be patterned after the Roster of Arbitrators maintained by FMCS for use in voluntary arbitrations of disputes arising under labor collective bargaining agreements.[117]

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[116] The National Institute for Dispute Resolution has a program for providing moderate grants to educational institutions and state governments to establish dispute resolution programs. Such "seed money" may be available to federal agencies that are interested in establishing pilot programs or policy guidelines for the use of ADR or regulatory negotiation.

IV.

DELEGATION ISSUES

A recurring issue with respect to federal government use of ADR techniques is whether the functions performed by private neutrals are unconstitutional under the "delegation" doctrine.[118] "Delegation" actually encompasses a number of different constitutional concepts, including violations of due process, delegation of legislative power, and violation of the Appointments Clause.[119]

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[117] 29 C.F.R. Part 1404.

[118] See Memorandum for Stephen J. Markman, Assistant Attorney General, Office of Legal Policy, "Administrative Conference Recommendation on Federal Agencies' Use of Alternative Dispute Resolution Techniques" (May 24, 1986).

[119] In addition, OMB Circular A-76, Performance of Commercial Activities, August 16, 1983, prohibits award of any contract "for the performance of an inherently governmental function." The Circular defines "governmental function" as follows:

> (1) The act of governing; i.e., the discretionary exercise of Government authority. Examples include criminal investigations, prosecutions and other judicial functions; management of Government programs requiring value judgments, as in direction of the national defense; management and direction of the Armed Services; activities performed exclusively by military personnel who are subject to deployment in a combat, combat support or combat service support role; conduct of foreign relations; selection of program priorities; direction of Federal employees; regulation of the use of space, oceans, navigable rivers and other natural resources; direction of intelligence and counter-

(Footnote continued)

Due Process. In a line of cases dating back to the Depression era, the Supreme Court struck down legislative delegations of public decisionmaking authority to private entities on the ground that such delegations violated due process.[120] In each of these cases, the principal due process objection was that the power to regulate a group of private parties was delegated to a subgroup of such parties who had an interest in the result of the regulation. For example, in Carter v. Carter Coal Company[121] the Court was reviewing the Bituminous Coal Conservation Act of 1935. The Act established a national bituminous coal commission and divided the country into districts. Within each district, the majority of producers and miners were authorized to fix maximum hours of labor and minimum wages that were binding upon all producers and miners within the district. The Supreme Court held that this was an unconstitutional violation of due process, stating as follows:

> The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business.[122]

Other infirmities in the private delegations found unconstitutional by the due process line of cases are the lack of any specified standards for decision by the private parties, and the lack of any review by a government agency or court.

Delegation of legislative power. The principal case in this line of authority is A.L.A. Schecter Poultry Corp. v. United States.[123] Schecter struck down portions of the National Recovery Act as unconstitutional delegations of legislative power. In particular, Section 3 of the Act delegated to private parties and the President the power to enact codes of fair competition

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[119] (continued)
intelligence operations; and regulation of industry and commerce, including food and drugs.

[120] Carter v. Carter Coal Company, 298 U.S. 238 (1938); Seattle Title Trust Co. v. Roberge, 226 U.S. 1 (1928); Eubank v. City of Richmond, 226 U.S. 137 (1912).

[121] 298 U.S. 238 (1935).

[122] Id., 298 U.S. at 311.

[123] 295 U.S. 495, 537 (1935).

that were enforceable by injunction and punishable as crimes. The Court held that this "unfettered" delegation of legislative power was an unconstitutional violation of the separation of powers doctrine.

Appointments Clause. In this line of cases, the Court has nullified delegations of decisionmaking authority to private parties on the basis that official government functions cannot be performed by persons who were not appointed by the President with the advice and consent of the Senate pursuant to Article II, section 2, clause 2 of the Constitution. In Buckley v. Valeo[124] the Court held certain provisions of the Federal Election Campaign Act of 1971 to be unconstitutional on the basis that the majority of the voting members of the Federal Election Commission were appointed by the President pro tempore of the Senate and the Speaker of the House. The Commission had authority to make rules for carrying out the Act, to enforce the Act by bringing civil actions against violators, and to temporarily disqualify federal candidates for failing to file required reports. The Court held that the delegation of such regulatory and enforcement functions to persons not appointed by the President with the advice and consent of the Senate violated the Appointments Clause.

Under these various lines of delegation cases,[125] constitutional issues should not arise with respect to the various forms of ADR that are totally nonbinding, such as minitrials and mediation. In a minitrial, for example, the neutral advisor at most presides at the hearing and acts as a mediator between the principal negotiators. In no event does he render any kind of decision that is binding on either the private party or the government. The lack of any binding decisionmaking authority thus insolates nonbinding ADR from constitutional criticism.

Similarly, there should be no constitutional issues with respect to regulatory negotiation, as structured under the ACUS recommendations. First, the convenor/facilitator is not a decisionmaker, but rather a person who identifies the issues and the interested parties, and attempts to mediate a negotiated resolution among the parties. Second, under the ACUS recommendations, the product of the regulatory negotiation is a proposed rule that is not in any way binding upon the agency.[126] At the completion of the regulatory negotiation, the proposed regulation must be published in the Federal Register and subjected to the notice-and-comment rulemaking procedures of the Administrative Procedure Act.[127]

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[124] 424 U.S. 1 (1976).

[125] See generally Liebmann, Delegation to Private Parties in American Constitutional Law, 50 Ind. L.J. 650 (1975).

[126] See R. H. Johnson & Co. v. SEC, 198 F.2d 690 (2d Cir.), cert. denied, 344 U.S. 855 (1952); United Black Fund, Inc. v. Hampton, 352 F.Supp. 898 (D.D.C. 1972).

The constitutional delegation issues arise principally with respect to neutrals who have authority to issue decisions that are binding upon the parties to a dispute. This is most likely to be an issue in the case of arbitration. Again, however, if agencies follow the details of the ACUS recommendation regarding ADR, constitutional issues should be avoided.[128] Under the ACUS recommendation, resort to arbitration is a voluntary decision of the parties, unless mandated by a statute. Thus all parties consent to the arbitration proceeding. In addition, the parties have a role in the selection of the arbitrators, thus insuring that they will be neutral and disinterested. The decision of the arbitrator is subject to judicial review under the standards of the U.S. Arbitration Act.[129] Finally, the ACUS recommendation provides that arbitration is appropriate only when the norms for decision have been established by statute, precedent, or rule.[130]

Thus, the potential due process objections to delegations of decisionmaking authority to private parties should not apply to voluntary arbitration, as structured by the ACUS recommendation. The fact that the interested parties consent to the procedure as a practical matter eliminates the potential for due process challenge. Moreover, the traditional due process objections (self-interest of the decisionmaker, lack of decisional norms, and lack of judicial review) are specifically addressed and resolved by the ACUS recommendation.

Finally, any doubts regarding whether binding arbitration complies with the due process clause are probably eliminated by the Supreme Court's decision in Schweiker v. McClure.[131] That case involved review of provisions of the Social Security Act establishing the Medicare program. The Act provided that any disputes regarding Medicare claims would be subject to mandatory arbitration by employees of private insurance carriers who had been retained to administer the program. Implementing regulations promulgated by the Department of Health and Human Services required that these private "hearing officers" be attorneys or other qualified individuals who (1) had the ability to conduct formal hearings; (2) generally understood of medical matters and terminology; and (3) possessed a thorough knowledge of the Medicare program, including the statute and regulations on which it is based.[132]

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[127] ACUS Recommendation 82-4, 1 C.F.R. § 305.82-4, ¶¶ 13-14.

[128] ACUS Recommendation 86-3, 1 C.F.R. § 305.86-3, ¶ 4.

[129] 9 U.S.C. § 10.

[130] ACUS Recommendation 86-3, 1 C.F.R. § 305.86-3, ¶ 5(a)(2).

[131] 456 U.S. 188 (1982).

The Supreme Court held that this scheme complies with due process. The Court stated that there was a presumption that the hearing officers who decided Medicare claims were unbiased. Since claims were ultimately paid by the federal government, and not their private employers, the hearing officers had no personal or financial interest in the outcome of the proceedings. In addition, the requirement that hearing officers have pertinent experience and familiarity with the Medicare program minimized the risk of an erroneous decision and the probable value of additional procedural safeguards.[133] Under Schweiker, therefore, mandatory arbitration schemes are constitutional under the Due Process Clause, so long as the arbitrator are disinterested and possess adequate qualifications.[134]

Nor should binding arbitration, as defined in the ACUS recommendation, involve unconstitutional delegation of legislative power or violation of the Appointments Clause. Recommendation 86-3 makes it clear that binding arbitration is inappropriate where the norms for decision are not established by statute, regulation, or precedent.[135] Thus, arbitrators will in no event be making policy decisions, but rather will be applying existing decisional standards to the facts of a particular dispute. Certainly, an arbitrator's award cannot be fairly analogized to the codes of fair competition that were struck down in the Schecter Poultry case; in that case, the codes established norms for behavior by private parties that were enforceable through injunctions or criminal actions. An arbitrator's award simply resolves a fact-specific dispute between a private party and the government, or among private parties.

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[132] Id., 456 U.S. at 199.

[133] Id., 456 U.S. at 198-99. See also Thomas v. Union Carbide Agricultural Products Co., ____ U.S. ____, 105 S. Ct. 3325 (1985) (Upholding binding arbitration provisions of the FIFRA).

[134] A specific statutory mandate does not appear necessary for the delegation of decisionmaking authority by an agency. See Tabor v. Joint Board for the Enrollment of Actuaries, 566 F.2d 705, 708 (D.C. Cir. 1977).

[135] ACUS Recommendation 86-3, 1 C.F.R. § 305.86-3, ¶ 5(a)(2).

Finally, arbitrators do not have the authority to promulgate or enforce regulations, as did the Federal Electoral Commission in Buckley v. Valeo.[136] Thus, the Appointments Clause should not stand in the way of agencies' employing arbitration under the ACUS recommendation.

V.

CONCLUSIONS

The challenges facing federal agencies in expanding the use of ADR and regulatory negotiations include developing and refining procurement procedures that will streamline the process of hiring outside neutrals, and developing a broader base from which to draw in acquiring the services of private or government neutrals. Meeting this challenge will require that agencies be flexible in defining the qualifications required of outside neutrals, avoiding rigid requirements of technical expertise or specific ADR experience unless such qualities are essential to the success of the proceedings. Agencies would also benefit from efforts to pool information about their experience with ADR neutrals, ideally with the advice and assistance of agencies like ACUS and FMCS. Advantage should be taken of opportunities to train government personnel in ADR skills, and to utilize the expertise of existing dispute resolution services within the government. Finally, agencies should use existing procurement techniques in imaginative ways, and seek to develop new techniques, so that the services of qualified ADR neutrals can be acquired without the delays and procedural hurdles inherent in the normal competitive procurement process.

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[136] In the specific context of government contracts disputes, an issue has been raised as to whether binding arbitration would violate the requirements of the Contract Disputes Act of 1978, 41 U.S.C. § 601 et seq. (1982). That Act expressly authorizes agency boards of contract appeals or the U.S. Claims Court to hear and decide appeals arising out of disputes between government contractors and federal agencies. Arguably, the Contracts Disputes Act would pose a barrier to the use of arbitration in government contracts disputes unless the Act were specifically amended to permit arbitration.

Appendix A

DEPARTMENT OF THE ARMY EC 27-1-3
US Army Corps of Engineers
DAEN-CCZ Washington, D.C. 20314-1000

Engineer Circular
No. 27-1-3 23 September 1985

EXPIRES 30 SEPTEMBER 1986
Legal Services
ALTERNATE DISPUTE RESOLUTION: MINI-TRIALS

1. Purpose. This circular sets forth guidance for the use of a mini-trial as an alternate dispute resolution procedure in contract appeals. The mini-trial is an alternative to litigation before the Engineer Board of Contract Appeals (ENG BCA) and the Armed Services Board of Contract Appeals (ASBCA). Guidance pertains to case selection and procedures.

2. Applicability. This circular applies to all HQUSACE/OCE elements and all FOA processing contract appeals pending before the ENG BCA or ASBCA.

3. Reference. EFARS Appendix N, "Contract Requests, Contract Dispute Claims and Appeals."

4. General.

a. Definition. A mini-trial is a voluntary, expedited, and nonjudicial procedure whereby top management officials for each party meet to resolve disputes.

b. Background. The mini-trial was developed as an alternative to litigation because of the costs, delays and disruptions associated with litigation. Although the term mini-trial has been coined, it is not really a trial. It is a technique used to bring top management officials together voluntarily to resolve disputes in a short period of time rather than relying upon a third party such as a judge to decide the matter. The mini-trial consists of a blend of selected characteristics from the adjudicative process with arbitration, mediation and negotiation. This blend can be structured to meet the particular needs of the parties.

c. Characteristics.

(1) Top Management Involvement. Top management officials for both parties are directly involved as principals in making the decision to resolve the dispute.

(2) Time Period Limited. The time period for the process is short. In most cases it should be completed within two to three months.

(3) Informal Hearing Format. The hearing is informal and in most instances should last only one to two days. Each party has a representative make a presentation to the principals.

(4) Discussions Non-binding. At the conclusion of the hearing, the principals meet by themselves to discuss the dispute. These discussions are non-binding and are kept strictly confidential.

(5) Neutral Advisor Input. A neutral advisor may be retained by the parties to assist in the mini-trial.

5. Case Selection.

a. Initial Determination. The Division Engineer has the authority to select a pending contract appeal for the mini-trial process. This decision may be based upon the request of the appellant.

b. Procedures. Upon receipt of the contract appeal file by the Division Engineer, it will be reviewed by appropriate staff members, including the Division Counsel. When a mini-trial is recommended, the Division Counsel will prepare a report to the Division Engineer setting forth the reasons for the recommendation.

c. Time of Case Selection. The selection of a pending appeal should be made after Division review has been completed so that the facts and issues have been sufficiently developed.

d. Types of Disputes. While most contract appeals are suitable for mini-trials, appeals involving clear legal precedent or having significant precedential value are not appropriate.

6. Initiation of Process.

a. Offer to Appellant. Once the decision has been made that an appeal is appropriate for a mini-trial, the Division Engineer will offer appellant the opportunity to participate in the process. At that time, the Division Counsel should notify the government trial attorney and the Chief Trial Attorney, (DAEN-CCF) that a mini-trial is being offered to appellant. Appellant will be advised that the procedure is voluntary and will not prejudice its appeal before the Board. The Division Engineer will explain the nature of the mini-trial and set forth its basic characteristics and participants. Appellant will also be advised that the parties will have to enter into a written agreement governing the mini-trial procedures.

b. Participants.

(1) Principals.

(a) The Government's principal participant will be the Division Engineer. However, in appropriate circumstances in the discretion of the Division Engineer, the principal participant may be the Deputy Division Engineer. The authority of the Division Engineer to resolve the contract claim shall be set forth in a warrant as the contracting officer for purpose of the mini-trial. The request for a warrant shall be submitted to HQUSACE (DAEN-PR) WASH DC 20314-1000.

(b) The contractor's principal should be a senior management official who has authority to settle the appeal. Further, if possible, the contractor's principal should not have been previously involved with the preparation of the claim or presentation of the appeal.

(2) Representatives. Each party will designate a representative who will act as point of contact and make the mini-trial presentation. The government trial attorney should be the Government representative.

(3) Neutral Advisor. At the option of the parties, a neutral advisor may be used to assist in the mini-trial. The neutral advisor must be an impartial third party with experience in government contracting and litigation.

The Chief Trial Attorney (DAEN-CCF) will maintain a list of neutral advisors. The name of anyone not on the list may be submitted by the Division Counsel for addition to the list.

(c). Mini-Trial Agreement. The Division Counsel, in coordination with the Government trial attorney should negotiate the mini-trial agreement with appellant. The agreement will contain the procedures to be followed during the course of the mini-trial. The agreement must contain specific time limitations to assure that the mini-trial is handled in an expeditious manner. The agreement should be executed by the principals and representatives for both parties. A sample agreement is at Appendix A. However, each mini-trial agreement should be structured to meet the needs of each situation.

(d) Contracting With the Neutral Advisor. The services provided by the neutral advisor are non-personal in nature and therefore the engagement of a neutral advisor may be handled by entering into a non-personal services tripartite contract in compliance with FAR, Part 37, Subpart 37.1. The parties to this tripartite contract will be the Government, the contractor, and the neutral advisor. The contract should, at a minimum, cover the services to be furnished by the neutral advisor; the time for performance of such services (which shall include a "not to exceed" time for the performance of such services); the total price for the services of the neutral advisor with a breakdown of the price to indicate the amount to be paid by the Government and the amount to be paid by the contractor.

(e) Suspension of Board Proceedings. Upon the execution of the mini-trial agreement, the government trial attorney should file a motion to suspend proceedings before the Board of Contract Appeals. Appellant shall be requested to make this a joint motion. The motion should advise the Board that the suspension is for the purpose of conducting a mini-trial and should state the time limitation for completing the mini-trial.

7. Procedures.

a. General. The mini-trial process is flexible and as such the procedures should reflect the needs of the parties considering the time and costs involved.

b. Time Considerations. Since the mini-trial must be conducted in an expeditious manner the schedule set forth in the mini-trial agreement must be strictly adhered to. The agreement must expressly state the time limitations for discovery, the mini-trial presentation and the post-presentation discussions.

c. Discovery. All mini-trial discovery should be on the record. The scope of discovery should be limited by the parties in the agreement. This may include limiting the number and length of both depositions and interrogatories. Discovery should conclude at least two weeks prior to the mini-trial.

d. Pre Mini-Trial Conference.

(1) Timing. At the conclusion of discovery the representatives should confer with the neutral advisor, if any, and arrange for the timely exchange of written submittals.

(2) Written Submittals. The parties may use any type of written submittal which will further the progress of the mini-trial. A position paper, the format and length of which should be specified in the mini-trial agreement, is recommended. The parties should also agree to exchange exhibits and witness lists. Appellant should submit a quantum analysis which identifies the costs associated with issues that will arise during the mini-trial.

e. Mini-Trial.

(1) Location. The site for conducting a mini-trial should be specified in the mini-trial agreement. The cost of the site, if any, should be shared equally by both parties.

(2) Manner of Presentation. The allocation of time during the mini-trial is at the discretion of the parties. The hearing should not exceed two days. The mini-trial agreement should specify the exact time for each presentation and the type of presentation, whether direct or rebuttal. The time limitations should be strictly adhered to. Each representative shall have the discretion to structure its presentation as desired. This may include the examination of witnesses including expert witnesses, audio

visuals, demonstrative evidence and oral argument. Any testimony given shall be unsworn. Furthermore, the recording or verbatim transcription of testimony will not be acceptable. The mini-trial agreement should indicate whether the neutral advisor and opposing representatives or principals will be permitted to examine witnesses. If agreed, a time for such examination should be specified in the agreement. Also, closing statements should be made since post-hearing briefs are not submitted.

(3) Role of the Neutral Advisor. The neutral advisor shall be present at the hearing and provide such services as are specified in the mini-trial agreement, such as the application of the agreement and providing an oral or written opinion on the merits of the claim. The agreement shall provide that the neutral advisor may not be called as a witness in any subsequent litigation concerning the claim. The cost of the neutral advisor shall be shared equally by both parties.

f. Settlement Discussions. The principals should meet immediately following the mini-trial to discuss resolution of the claim. The meeting should be conducted privately, but the mini-trial agreement may provide for the principals to consult with the neutral advisor. Also a principal may consult with staff members. Any additional examination of witnesses or argument by representatives shall be conducted in the presence of both principals and, if applicable, the neutral advisor.

g. Confidentiality. The advice of the neutral advisor, if any, and the discussions between the principals shall not be used in any subsequent litigation as an indication or admission of liability or to indicate what either party was willing to agree to as a part of the settlement discussions.

h. Termination. Since the mini-trial is a voluntary process, either principal may terminate the mini-trial agreement at any time.

8. Notification. When a mini-trial is initiated the Chief Trial Attorney (DAEN-CCF) must be notified in writing. Such notification should include a copy of the Division Counsel's report to the Division Engineer and a copy of the mini-trial agreement.

FOR THE COMMANDER:

Lester Edelman

LESTER EDELMAN
Chief Counsel

1 Appendix:
App A - Sample
Mini-Trial Agreement

EC 27-1-3
23 September 1985

APPENDIX A

MINI-TRIAL AGREEMENT
BETWEEN THE
UNITED STATES ARMY CORPS OF ENGINEERS
AND
APPELLANT

This mini-trial agreement dated this _____ day of __________, 19____ is executed by ______________________________, Division Engineer, United States Army Corps of Engineers on behalf of the Corps, and by ____________________________, on behalf of ____ hereinafter referred to as ________________________________.

WHEREAS: On the ____ day of _______________, 19____, the parties hereto entered into Contract No. ___________________ for the ____ ____;

WHEREAS, under the Disputes Clause (General Provision No. 4) of that contract, Appellant on _____________ ____, 19____ filed a claim with the contracting officer alleging ________ ____ ____ ____;

WHEREAS, Appellant certified its claim in accordance with the requirements of the Contract Disputes Act of 1978;

WHEREAS, in a letter dated ____________ ____, 19______ the contracting officer issued a final decision denying appellant's claim;

WHEREAS, on ____________ _____, 19____ Appellant appealed the contracting officer's final decision to the ________________ Board of Contract Appeals where the appeal has been docketed as (ASBCA) (ENG BCA) No. ________;

WHEREAS, the Corps has instituted an Alternative Contract Disputes Resolution Procedure known as a "Mini-Trial", which procedure provides the parties with a voluntary means of attempting to resolve disputes without the necessity of a lengthy and costly proceeding before a Board of Contract Appeals nor prejudicing such proceeding; and

WHEREAS, the Corps and Appellant have agreed to submit (ASBCA) (ENG BCA) No.__________ to a "Mini-Trial".

NOW THEREFORE, subject to the terms and conditions of this "Mini-Trial" agreement, the parties mutually agree as follows:

1. The Corps and Appellant will voluntarily engage in a non-binding mini-trial on the issue of ______________________

____

____.

The mini-trial will be held on _____________ ____, 19 ____

at ______________________ _______________________.

2. The purpose of this mini-trial is to inform the principal participants of the position of each party on the claim and the underlying bases of such. It is agreed that each party will have the opportunity and responsibility to present its "best case" on entitlement and quantum.

3. The principal participants for the purpose of this mini-trial will be __________________________________ for the Corps, and ____________________________ for appellant. The principal participants have the authority to settle the dispute. Each party will present its position to the

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principal participants through a trial attorney(s). In addition, ____________________ will attend as a mutually selected "neutral advisor".

4. The role of the neutral advisor is that of an advisor. The neutral advisor will not be actively involved in the conduct of the mini-trial proceedings. The neutral advisor may ask questions of witnesses only if mutually agreed to by the principal participants. Upon request by either principal the neutral advisor will provide comments as to the relative strengths and weaknesses of that party's position.

5. The Government trial attorney will provide the neutral advisor with copies of this agreement and the Rule 4 appeal assembly. Other source materials, statements, exhibits and depositions may be provided to the neutral advisor by the trial attorneys, but only after providing the same materials to the other trial attorney. Neither trial attorney shall conduct ex parte communications with the neutral advisor.

6. The fees and expenses of the neutral advisor shall be borne equally by both parties. Except for the costs of the neutral advisor, all costs incurred by either party in connection with the mini-trial proceedings shall be borne by that party, and shall not be treated as legal costs for apportionment in the event that the dispute is not resolved, and proceeds to a Court or Board determination.

7. Unless completed prior to the execution of this agreement, the parties will enter into a stipulation setting forth a schedule for discovery to be taken and completed ______ weeks prior to the mini-trial. Discovery taken during the period prior to the mini-trial shall be admissible for all purposed in this litigation, including any subsequent hearing before any Board or competent authority in the event this mini-trial does not result in a resolution of this appeal. It is agreed that the pursuit of discovery during the period prior to the mini-trial shall not restrict either party's ability to take additional discovery at a later date. In particular, it is understood and agreed that partial depositions may be necessary to prepare for the mini-trial. If this matter is not resolved informally as a result of this procedure, more complete depositions of the same individuals may be necessary. In such case the partial depositions taken during this interim period shall in no way foreclose additional depositions of the same individual into the same or additional subject matter for a later hearing date before a Court or Board.

8. No later than _____ weeks prior to commencement of the mini-trial, ________________________________ shall submit to the Corps a quantum analysis which identifies the costs associated with the issues that will arise during the mini-trial.

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9. The presentations at the mini-trial will be informal. The rules of evidence will not apply, and witnesses may provide testimony in the narrative. The principal participants may ask any question of the witnesses that they deem appropriate. However, any such questioning by the principals shall be within the time period allowed for that parties' presentation of its case as hereinafter delineated in paragraph 10.

10. At the mini-trial proceeding, the trial attorneys have the discretion to structure its presentation as desired. The form of presentation may be through expert witnesses, audio visual aids, demonstrative evidence, depositions and oral argument. The parties agree that stipulations will be utilized to the maximum extent possible. Any complete or partial depositions taken in connection with the litigation in general, or in contemplation of the mini-trial proceedings, may be introduced at the mini-trial as information to assist the principal participants understanding of the various aspects of the parties' respective positions. The parties may use any type of written material which will further the progress of the mini-trial. The parties may, if desired, no later than __________ weeks prior to commencement of the mini-trial, submit to the representatives for the opposing side, as well as the neutral advisor, a position paper of

no more than 25 - 8-1/2 X 11 double spaced pages. No later than _____ week(s) prior to commencement of the proceedings, the parties will exchange copies of all documentary evidence proposed for utilization at the mini-trial, inclusive of a listing of all witnesses.

11. The mini-trial proceedings shall take ________ day(s). The morning's proceedings shall begin at ____ a.m. and shall continue until ______ a.m. The afternoon's proceedings shall begin at ______ p.m. and continue until ____ p.m. (A sample two day schedule follows:)

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SCHEDULE

Day 1

8:30 a.m. - 12:00 Noon	Appellant's position & case presentation.
12:00 Noon - 1:00 p.m.	Lunch*
1:00 p.m. - 2:30 p.m.	Corps' cross-examination.
2:30 p.m. - 4:00 p.m.	Appellant's re-examination.
4:00 p.m. - 5:00 p.m.	Open question & answer period.

Day 2

8:30 a.m. - 12:00 Noon	Corps' position & case presentation.
12:00 Noon - 1:00 p.m.	Lunch*
1:00 p.m. - 2:30 p.m.	Appellant's cross-examination.
2:30 p.m. - 3:00 p.m.	Corps' re-examination.
3:00 p.m. - 4:30 p.m.	Open question and answer period.
4:30 p.m. - 4:45 p.m.	Appellant's closing argument.
4:45 p.m. - 5:00 p.m.	Corps' closing argument.

*Flexible time period for lunch of a stated duration.

11. Within _______ day(s) following the termination of the mini-trial proceedings, the principal participants should meet, or confer, as often as they shall mutually agree might be productive for resolution of the dispute. If the parties are unable to resolve the dispute within ___ days following completion of the mini-trial, the mini-trial process shall be deemed terminated and the litigation will continue.

12. No transcript or recording shall be made of the mini-trial proceedings. Except for discovery undertaken in connection with this appeal, all aspects of the mini-trial including, without limitation, all written material prepared specifically for utilization at the mini-trial, or oral presentations made, between or among the parties and/or the advisor at the mini-trial are confidential to all persons, and are inadmissible as evidence, whether or not for purposes of impeachment, in any pending or future Court or Board action which directly or indirectly involves the parties and this matter in dispute. However, if settlement is reached as a result of the mini-trial, any and all information prepared for, and presented at the proceedings may be used to justify and document the subsequent settlement modification. Furthermore, evidence that is otherwise admissible shall not be rendered inadmissible as a result of its use at the mini-trial.

13. The neutral advisor will be instructed to treat the subject matter of this proceeding as confidential, and refrain from disclosing any of the information exchanged to third parties. The neutral advisor is disqualified as a witness, consultant or expert for either party in this and any other dispute between the parties arising out of performance of Contract No. __________________________.

14. Each party has the right to terminate the mini-trial at any time for any reason whatsoever.

15. Upon execution of this mini-trial agreement, if mutually deemed advisable by the parties, the Corps and Appellant shall file a joint motion to suspend proceedings of this appeal before the ______________ Board of Contract Appeals. The motion shall advise the Board that the suspension is for the purpose of conducting a mini-trial. The Board will be advised as to the time schedule established for completing the mini-trial proceedings.

DATED __________________	DATED __________________
BY: ______________________	BY: ______________________
Principal participant for Corps	Principal participant for
__________________________	__________________________
Attorney for the Corps	Attorney for Appellant

NOTE: This agreement reflects a mini-trial which involves a neutral advisor. In the event a neutral advisor is not used, you should eliminate all references to the neutral advisor.

U.S. Department of Justice

Appendix B

Washington, D.C. 20530

MEMORANDUM

JUN 1 9 1986

TO: Commercial Litigation Branch Attorneys

FROM: Stuart E. Schiffer
Deputy Assistant Attorney General
Civil Division

SUBJECT Alternative Dispute Resolution -- Mini-Trials

Mini-trials, a form of alternative dispute resolution, can be a less expensive, less time-consuming means of resolving disputes between the Government and private parties. It is our policy to encourage alternative means of resolving disputes when these goals can be achieved.

Attached is a statement of policy regarding the use of mini-trials. If you are responsible for a case that you believe is amenable to resolution by mini-trial, please consult with your reviewer.

Attachment

App. B

JUN 19 1986

COMMERCIAL LITIGATION BRANCH POLICY CONCERNING THE USE OF MINI-TRIALS

I.

STATEMENT OF POLICY

It is the policy of the Commercial Litigation Branch of the Department of Justice to consider carefully and, where appropriate, implement methods for resolving disputes that are alternatives to judicial proceedings. In furtherance of that policy, the Branch will participate in mini-trials as a form of alternate dispute resolution. Branch attorneys are encouraged to assess cases assigned to them for the potential for resolution by mini-trial and are requested to forward requests for mini-trials from opposing counsel to obtain a decision by an appropriate Department of Justice official. Branch attorneys should make it clear to opposing counsel, however, that the Branch will not participate in a mini-trial unless appropriate Departmental officials, in the exercise of their discretion, determine that participation is appropriate and in the best interests of the Government.

II.

GENERAL

1. Definition. A mini-trial is a voluntary, expedited, nonjudicial procedure through which management officials for each party meet to resolve disputes.

2. Purpose. A mini-trial is intended to reduce the cost, disruption and delay associated with litigation.

3. Description. A mini-trial is not actually a trial; rather, it is a process designed to facilitate settlement by educating the parties' principals regarding the strengths and weaknesses of the positions of both parties. The process combines the salutary aspects of negotiation and litigation, using flexible procedures designed to meet the needs of each individual case.

4. Attributes. The following are characteristic of all mini-trials in which the Department will participate:

a. Involvement of Principals: Management officials with settlement authority (or with the authority to make a final recommendation as to settlement) for both parties participate directly.

b. Expedited Time Period: The time period allowed for a mini-trial is brief and deadlines are expedited.

c. Non-binding Discussions By Principals: At the close of the presentation, the principals meet by themselves to attempt to resolve the dispute. These discussions are not binding and may not be used by either party in any subsequent proceedings.

d. Informality: All proceedings are informal.

In addition, where appropriate, the parties may select a neutral advisor to provide advice to the management officials involved in the mini-trial.

III.

CRITERIA FOR SELECTING CASES

Cases likely to be governed by clear legal precedent are not good candidates for resolution by mini-trial. Cases which involve factual disputes, which do not depend upon the credibility of the witnesses, are preferred. Cases which are expected to establish important legal precedent and those which are clearly without merit do not lend themselves to resolution by mini-trial.

IV.

INITIATION OF PROCESS

The suggestion that a mini-trial be conducted may emanate from either party. If the non-governmental party requests a mini-trial, the Department's trial attorney is requested to submit that request, along with his or her recommendations and those of the interested agency, to his or her supervisor. If the Department's attorney, in the absence of a request by the non-governmental party, concludes that a mini-trial would be advantageous, he or she shall obtain the recommendations of the interested agency, obtain approval from appropriate supervisors and then propose this procedure to the opposing party. The opposing party will be supplied with a copy of this memorandum and will be advised that a written agreement between the parties is a prerequisite to initiating the procedure. The decision to participate in a mini-trial requires the approval of the Deputy Assistant Attorney General in charge of the Branch and is solely within the discretion of the Department.

V.

PARTICIPANTS

The Government's principal participant will be the Department of Justice official with settlement authority or, where that is not feasible, the official with the authority finally to recommend acceptance of a settlement. Usually, the official or officials within the interested agency or agencies with authority to make recommendations which are binding upon the agency or agencies will participate as a secondary principal for the Government.

The non-governmental party's principal participant must be a senior level management official who possesses authority to settle the dispute in the absence of litigation. Where possible, the official should be an individual who has not participated in preparing the case for litigation.

Each party will designate one representative who will be responsible for conducting the mini-trial and ensuring that procedures are followed. The Department's attorney of record will be the Government's representative.

Where appropriate, the parties may agree upon a neutral advisor to advise the management officials who participate in the mini-trial. The neutral advisor should be a person with either legal or substantive knowledge in a relevant field. The neutral advisor should have no prior involvement in the dispute or the litigation and must possess no interest in the result of the mini-trial. The neutral advisor and the parties must agree in advance that the neutral advisor will have no further involvement in the litigation should the mini-trial fail to result in a settlement.

VI.

THE MINI-TRIAL AGREEMENT

The mini-trial agreement is a written document, signed by the principals and the representatives, in which the parties agree to the procedures to be used. While each mini-trial agreement should be structured so as to meet the needs of each individual case, every agreement must contain specific expedited time limitations for each aspect of the procedure, a statement regarding the non-binding nature of the procedure, and an agreement that the parties will seek a suspension of proceedings in the pending litigation while the mini-trial process is continuing. The mini-trial agreement will be negotiated by the representatives, with the approval of the principals. A sample mini-trial agreement is Appendix A to this memorandum.

VII.

PROCEDURES

While the procedures to be used are subject to negotiation and should be designed to meet the needs of each individual case, the following procedures are generally considered to be appropriate:

a. Time Limits: Time limitations are to be explicit, brief and strictly observed.

b. Discovery: Discovery procedures should be expedited and should be the subject of a specific provision contained in the mini-trial agreement. The parties should consider including in the agreement a limitation upon the scope of discovery as well as the number and length of depositions and interrogatories. Discovery conducted prior to the initiation of mini-trial procedures shall not be duplicated during the mini-trial process. A nongovernmental party may not conduct discovery under the mini-trial agreement if it has pending a request or requests for disclosure of information under the Freedom of Information Act. The mini-trial agreement should normally provide that discovery shall be completed at least two weeks prior to the mini-trial.

c. Written Submittals: The parties should normally provide for an exchange of written submittals prior to the mini-trial. The mini-trial agreement should set forth the timing, format and length of the submittals. The written submittal of the nongovernmental party must include an analysis of its quantum claim which includes information regarding the source of the figures. At the time the written submittals are exchanged, the parties should also exchange exhibit lists and, if applicable, witness lists.

d. Location of the Mini-Trial: The location of the mini-trial shall be specified in the mini-trial agreement. Government facilities may be used; the Government will not agree to pay any part of a fee charged for the use of nongovernmental facilities.

e. Manner of Presentation at the Mini-Trial: The allocation of the time agreed upon for presentation of the case to the principals shall be set forth in the mini-trial agreement. The presentation should exceed one day only in exceptional circumstances. The time allotted to each representative may be used as that representative desires, including examination of or presentations by witnesses, demonstrative evidence and oral argument. Recording or verbatim transcription of the testimony shall not be allowed. The mini-trial agreement may provide for an opportunity for the principals to examine any witnesses.

f. Neutral Advisor: The parties may agree that a neutral advisor shall be present during the mini-trial in order to provide an opinion, upon request, to the principals on any issue upon which the parties agree in advance. The neutral advisor should be selected by agreement of the parties. The advisor should be a person with legal and/or relevant substantive knowledge and should be a person who has had no prior involvement in the dispute or the litigation. The parties shall agree in advance upon the amount of compensation to be paid to the neutral advisor and the manner in which this compensation shall be paid. The neutral advisor shall agree in advance that he or she will have no further involvement in the case should the mini-trial fail to dispose of the litigation.

g. Settlement Discussions: The principals shall meet immediately following presentation of the mini-trial to discuss the possibility of settling the claim. This meeting shall be private, although the mini-trial agreement may provide that each principal may designate an individual to act as his or her technical advisor. This individual may not be the party's representative. A principal may consult with his or her attorneys, although they may not take part in the discussions regarding settlement.

h. Confidentiality: The discussion which takes place between the principals shall not be used for any purpose in any subsequent litigation.

i. Termination: Any party may terminate mini-trial proceedings at any time.

APPENDIX A

MINI-TRIAL AGREEMENT
BETWEEN THE
UNITED STATES
AND
____

This mini-trial agreement dated this _____ day of _____________, 19__, is executed by ____[name]______, ____[title]____, on behalf of the United States and by ______[name]_______, on behalf of ____[name of plaintiff]____, hereinafter referred to as plaintiff.

WHEREAS: On the _____ day of __________, 19__, plaintiff and the United States entered into Contract No. _____________________ ____for the ____ ____;

WHEREAS, under the Contract Disputes Act of 1978, plaintiff on _________________, 19__, filed a suit in the United States Claims Court alleging ____ ____ ____ _____________________________________;

WHEREAS, the United States and plaintiff have agreed to submit
__[name of case]__ No. __[docket no.]__ to a "Mini-Trial";

NOW THEREFORE, subject to the terms and conditions of this "Mini-Trial" agreement, the parties mutually agree as follows:

1. The United States and plaintiff will voluntarily engage in a non-binding mini-trial on the issue of ______________________________
____
____.
The mini-trial will be held on ______________________, 19__, at
__[time of day]__ at ______[location]______.

2. The purpose of this mini-trial is to inform the principal participants of the position of each party on the claim and the underlying bases of the parties' positions. It is agreed that each party will have the opportunity and responsibility to present its "best case" on entitlement and quantum.

3. The principal participants for the purpose of this mini-trial will be ________________________________ for the United States and ___________________________ for plaintiff. The principal participants have the authority to settle the dispute or to make a final recommendation concerning settlement. Each

party will present its position to the principal participants through that party's designated representative, ______________, for the United States, and _____________, for plaintiff.

4. The parties have agreed that _____________________ shall serve as a neutral advisor to the principals. The neutral advisor shall be compensated as set forth in a separate agreement with the advisor. The advisor has warranted that he or she has had no prior involvement with this dispute or litigation and has agreed that he or she will not participate in the litigation should the mini-trial fail to resolve the dispute.

The neutral advisor shall participate in the mini-trial proceedings and shall render an opinion, upon request, on the following issues: ____

____

____. NOTE: This clause is to be used only if the parties have agreed that the participation of a neutral advisor would be useful.

5. All discovery will be completed in the twenty working days following the execution of this agreement. Neither party shall propound more than 25 interrogatories or requests for admissions, including subparts; nor shall either party take more than five depositions and no deposition shall last more than three hours. Discovery taken during the period prior to the mini-trial shall be admissible for all purposes in this litigation,

including any subsequent hearing before any board or competent authority in the event this mini-trial does not result in a resolution of this appeal. It is agreed that the pursuit of discovery during the period prior to the mini-trial shall not restrict either party's ability to take additional discovery at a later date. In particular, it is understood and agreed that partial depositions may be necessary to prepare for the mini-trial. If this matter is not resolved informally as a result of this procedure, more complete depositions of the same individuals may be necessary. In that event, the partial depositions taken during this interim period shall in no way foreclose additional depositions of the same individual into the same or additional subject matter for a later hearing.

6. No later than _____ weeks prior to commencement of the mini-trial, the plaintiff shall submit to the United States a quantum analysis which identifies the costs associated with the issues that will arise during the mini-trial and which identifies the source of all data.

7. The presentations at the mini-trial will be informal. The rules of evidence will not apply, and witnesses may provide testimony in narrative form. The principal participants may ask any questions of the witnesses. However, any questioning by the principals, other than that occurring during the period set

aside for questions, shall be charged to the time period allowed for that party's presentation of its case as delineated in paragraph 9.

8. At the mini-trial proceeding, the representatives have the discretion to structure their presentations as desired. The presentation may include the testimony of expert witnesses, the use of audio visual aids, demonstrative evidence, depositions, and oral argument. The parties agree that stipulations will be utilized to the maximum extent possible. Any complete or partial depositions taken in connection with the litigation in general, or in contemplation of the mini-trial proceedings, may be introduced at the mini-trial as information to assist the principal participants to understand the various aspects of the parties' respective positions. The parties may use any type of written material which will further the progress of the mini-trial. The parties may, if desired, no later than _____ weeks prior to commencement of the mini-trial, submit to the representatives for the opposing side a position paper of no more than 25 - 8 1/2" X 11" double spaced pages. No later than ___ week(s) prior to commencement of the proceedings, the parties will exchange copies of all documentary evidence proposed for use at the mini-trial and a list of all witnesses.

9. The mini-trial proceedings shall take one day. The morning's proceedings shall begin at ____ a.m. and shall continue until _____ a.m. The afternoon's proceedings shall begin at ____ p.m. and continue until ____ p.m. (A sample schedule follows.)

SCHEDULE

9:00 a.m. - 10:00 a.m.	Plaintiff's position and case presentation.
10:00 a.m. - 11:00 a.m.	United States' cross-examination.
11:00 a.m. - 11:30 a.m.	Plaintiff's rebuttal.
11:30 a.m. - 12:00 noon	Open question and answer period.
12:00 noon - 1:00 p.m.	Lunch
1:00 p.m. - 2:00 p.m.	United States' position and case presentation.
2:00 p.m. - 3:00 p.m.	Plaintiff's cross-examination.
3:00 p.m. - 3:30 p.m.	United States' rebuttal.
3:30 p.m. - 4:00 p.m.	Open question and answer period.
4:00 p.m. - 4:30 p.m.	Plaintiff's closing argument.
4:30 p.m. - 5:00 p.m.	United States' closing argument.

10. Within ____ day(s) following the termination of the mini-trial proceedings, the principal participants should meet, or confer, as often as they shall mutually agree might be productive for resolution of the dispute. If the parties are unable to resolve the dispute within ____ days following

completion of the mini-trial, the mini-trial process shall be deemed terminated and the litigation will continue.

11. No transcript or recording shall be made of the mini-trial proceedings. Except for discovery undertaken in connection with this mini-trial, all written material prepared specifically for utilization at the mini-trial, all oral presentations made, and all discussions between or among the parties and/or the advisor at the mini-trial are confidential to all persons, and are inadmissible as evidence, whether or not for purposes of impeachment, in any pending or future court or board action which directly or indirectly involves the parties and the matter in dispute. However, if settlement is reached as a result of the mini-trial, any and all information prepared for, and presented at the proceedings may be used to justify and document the subsequent settlement. Furthermore, evidence that is otherwise admissible shall not be rendered inadmissible as a result of its use at the mini-trial.

12. Each party has the right to terminate the mini-trial at any time for any reason whatsoever.

13. Upon execution of this mini-trial agreement, if mutually deemed advisable by the parties, the United States and the plaintiff shall file a joint motion to suspend proceedings in the Claims Court in this case. The motion shall advise the

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court that the suspension is for the purpose of conducting a mini-trial. The court will be advised as to the time schedule established for completing the mini-trial proceedings.

DATED ______________________	DATED ______________________
BY: ________________________	BY: ________________________
Principal participant for the United States	Principal participant for ______________________
______________________	______________________
Attorney for the United States	Attorney for ________________

SECTION M

EVALUATION FACTORS FOR AWARD

M-1. COMPETITIVE PROPOSAL EVALUATION

Every timely proposal received in response to this solicitation will be evaluated according to all of the criteria stated below. Numerical scores will be assigned each proposal according to the criteria stated in Article M-2 only.

M-2. NUMERICALLY RATED CRITERIA: Maximum Possible Score: One-hundred points (100 Points)

Subfactors in each category are generally listed in descending order of importance.

A. Experience 30 points

1. Ability and achievement as a facilitator in analysis of existing or incipient disputes and ability to assess conflicts and make cogent recommendations and professional judgements on the prospects for conflict resolution through a facilitated negotiation or similar process. Ability to gain acceptance and bring disputing parties into negotiations, and ability to communicate essential information without violating confidentiality.

2. Work experience and demonstrated achievement as a facilitator to work as a neutral third party with disputing parties in group problem solving and formal negotiations.

3. Skill, as demonstrated by experience, in effectively resolving scientifically and technically complex natural resource and environmental protection issues in dispute among many polarized parties.

4. Experience in advising disputing parties on techniques of coalition building, in-team bargaining, and negotiation while maintaining neutrality and credibility.

5. Experience in effectively managing negotiations related to regulations or other rulemakings, and knowledge of the Federal regulatory process as evidenced by research, publication, or experience.

6. Demonstrated ability and willingness to develop and use innovative dispute resolution techniques as evidenced by experience, research, and publication.

7. Ability to provide interactive graphic recording of meetings.

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SECTION M-continued

8. Knowledge or general familiarity with the outer continental shelf oil and gas program and the Outer Continental Shelf Lands Act.

B. Understanding of the Problem 25 points

1. How well the proposal discusses a clear rationale for the approaches, strategies, and procedures to be employed, and shows insight and understanding in developing a process likely to promote resolution of differences.

2. Clear understanding of the needs of the Department of the Interior and other parties to the California air quality rulemaking negotiation, and how well the proposal satisfies those needs.

3. How well the proposal discusses the use of innovative dispute resolution techniques and their applicability to this rulemaking.

C. Dispute Resolution Skills 25 points

Perceived ability to devise and effectively manage dispute resolution process, including the perceived ability to deal successfully with groups and individuals possessing different viewpoints on the issues which are the subject of the proposed rulemaking.

D. Technical Approach 10 points

1. How well the proposed methods, techniques, and procedures are likely to fulfill the stated project requirements and demonstrate a practical knowledge of the convening/facilitation process.

2. How well the proposal provides for full coordination of logistical and communications needs associated with scheduled meetings during the course of convening and negotiations.

3. How well the proposal provides for interactive graphic recording of meetings and timely delivery of all required reports and meeting summaries.

E. Personnel Staffing 10 points

1. Ability/flexibility to provide a staff/team having the proper mix of professional expertise and support skills necessary to manage not more than two simultaneous, multiple group problem solving sessions.

2. Availability of key personnel to fulfill requirements of the contract.

-3. COST PROPOSAL CRITERIA (No Numerical Weight Assigned)

A. In evaluating proposals for a cost reimbursement type contract, estimated costs of contract performance and proposed fees will not be considered as

SECTION M-continued

controlling factors, since in this type of contract advance estimates of costs may not provide valid indicators of final actual costs. There is no requirement that cost reimbursement type contracts be awarded on the basis of either (a) the lowest proposed cost, (b) the lowest proposed fee, or (c) the lowest total estimated cost plus proposed fee. Cost estimates will be evaluated to determine the prospective Contractor's understanding of the project and ability to organize and perform the contract. The agreed fee must be within the limits prescribed by law and agency procedures and appropriate to the work to be performed. It is the Department of the Interior's policy to use a structured approach for determining the fee objective in contracts such as this that require cost analysis (see DIAR Subpart 1415.9 and FAR Subpart 15.9).

B. The cost and business proposal must be clear, accurate, complete, and reflect a realistic and reasonable approach to the contract.

M-4. OTHER CRITERIA

The Contracting Officer shall consider several factors in the selection process which are important, but have not been assigned specific point values, such as:

(1) Proposals must respond to all the requirements of the RFP, and must include all information specifically required in all sections of the RFP.

(2) Award of a contract may not be made unless an agreement can be secured for all general and special contract provisions.

(3) Award of a contract shall not be made to any Offeror whose proposed period of performance is not within a period of time acceptable to the MMS.

(4) Award of a contract shall only be made to an Offeror determined to be a responsible Contractor by the Contracting Officer in accordance with the provisions of the Federal Acquisition Regulation 9.1.

M-5. CONTRACT AWARD

Contract award shall be made to the responsible Offeror whose offer, conforming to this RFP, is most advantageous to the Government, technical evaluation factors, cost, and other factors considered. The Government's objective is to obtain the highest technical quality considered necessary to achieve the project objectives with a realistic and reasonable cost. Technical evaluation factors as a whole are more important than cost; however, between proposals that are evaluated as substantially equal in technical quality, the estimated probable cost to the Government will be a major selection factor.

SECTION M - EVALUATION FACTORS FOR AWARD

M.1 EVALUATION CRITERIA/INSTRUCTIONS

a. An evaluation of all offers will be made in accordance with the criteria of this Section M.

b. This is a Solicitation for contract work in seven separate and distinct categories as identified in C.3 (i. e. items i through vii).

c. Offerors may submit one proposal identifying separate categories of interest as indicated in section L.10. Offerors may compete for only one category, several categories, or all seven categories.

d. The government will rate all proposals received for each of the categories against each other, and select the most responsive proposal(s). The government may award more than one contract in each of the above categories. When an offeror submits multiple proposals, the government may award a contract for one (or more), and reject the proposal(s) for other categories in favor of one from another offeror that is more responsive.

e. The Council on Environmental Quality shall assemble a technical evaluation panel composed of professional regulatory staff from the Council and other federal environmental agencies.

f. The Technical Proposals will be evaluated according to the offeror's understanding of the requirements of the Solicitation and the availability of an appropriate disciplinary mix of environmental scientists and technicians to accomplish tasks required under the scope of work (Section C). The Technical Proposal will also be rated as to the approach, methodology, and accuracy of the Work Plan for the Benchmark Task Order (Appendix J.2).

g. The Cost Proposal will be evaluated according to the relative costs set forth in the tables prepared in accordance with Section B of the RFP.

h. Proposals will also be compared by cost categories set forth in the cost Analysis for the Benchmark Task Order. (Refer to Sections B.7.b., H.9.c., L.11 and Appendices J.1. and J.2.)

M.2. RESPONSIBILITY

An offeror must be determined responsible according to the standards in FAR, Part 9, to be eligible for contract award.

M.3. CONTRACT AWARD

(a) The Government will award a contract from this solicitation to the responsible offeror whose offer conforming to the solicitation will be most advantageous to the Government, cost or price and other factors, specified elsewhere in this Solicitation, considered.

(b) The Government may (1) reject all offers, (2) accept other than the lowest offer, and (3) waive informalities and minor irregularities in offers received.

(c) The Government may award a contract on the basis of initial offers received, without discussions. Therefore, each initial offer should contain the offerors best terms from a cost or price and technical standpoint.

(d) A written award or acceptance of offer mailed or otherwise furnished to the successful offeror within the time for acceptance specified in the offer shall result in a binding contract without further action by either party. Before the offer's specified expiration time, the Government may accept an offer, whether or not there are negotiations after its receipt, unless a written notice of withdrawal is received before award. Negotiations conducted after receipt of an offer do not constitute a rejection or counter offer by the Government.

(e) Neither financial data submitted with an offer, nor representations concerning facilities or financing, will form a part of the resulting contract. However, if the resulting contract contains a clause providing for price reduction for defective cost or pricing data, the contract price will be subject to reduction if cost or pricing data furnished is incomplete, inaccurate, or not current.

M.4. TOTAL EVALUATED TECHNICAL SCORE

In weighted evaluations, the following formula will be used to arrive at the total evaluated technical score:

Each Vendor's
Total Number of
Technical Points X 75% = TOTAL EVALUATED TECHNICAL SCORE

M.5. TOTAL EVALUATED PRICE SCORE

For weighted evaluations, each proposal will be given a total evaluated price score based on the following formula:

Lowest Offered Price
Each Vendor's Offered
Price X 25% = TOTAL EVALUATED PRICE SCORE

M.6. TOTAL EVALUATED SCORE

The total score in this weighted evaluation section is determined by combining the total evaluated technical score and the total evaluated price score.

Appendix E

BENCHMARK TASK ORDER

INTRODUCTION

This is a sample Task Order in abbreviated format modeled after an actual negotiation conducted under the EPA project. It is indicative of the type of work to be expected under the Indefinite Quantity Contract.

As part of the response requirements for this Solicitation, each offeror must prepare a Work Plan (see Section L.10) and a Cost Analysis (see Section L.11) to illustrate its typical approach and methodology, assignment of personnel by labor category, and costs of the work broken down by accounting category and project subtask.

This Task Order consists of seven individual tasks, which are described in detail in sections C.2 and C.3 of this Request for Proposal. Although the tasks are interrelated, each represents a function of the negotiation process that is severable and could be performed by one contractor alone. In preparing your proposal, you may select any one (or more) of these tasks to compete for. However, both the Work Plan and Cost Analysis must clearly segregate the material for each task into clearly labeled Sections so that it can be evaluated separate and apart from other tasks. The Section in the Work Plan for any given task may not exceed 10 pages in length.

Your Work Plan should concentrate on the procedural, logistical, and administrative considerations of the task. Emphasize your approach, methodology, and assumptions. You may include a brief description of your qualifications to understand the technical environmental factors. (Such qualifications are helpful, but secondary to the procedural aspects.) Indicate staff requirements by labor category. Prepare your sample Work Plan and Cost Analysis according to the format set forth in Appendix J.1.

To perform its mission, the Council engages in joint projects with other federal environmental agencies concerned with the particular topic involved. This sample Task Order is written as if the project will be cosponsored by the Environmental Protection Agency (EPA).

I. BACKGROUND

On April 2, 1986, the Assistant Administrator for the Office of Pesticides and Toxic Substances has recommended that the Environmental Protection Agency use a negotiated rulemaking to develop the substance of a proposed rule for regulating the application of pesticides in areas where migrant farmworkers would be subject to exposure. A negotiated rulemaking is a relatively new procedure under which representatives of an agency and interested parties are convened to reach a consensus that forms the basis of the proposed rule published by the agency. By involving the interested parties in the formulation of the proposed rule with the assistance of a trained facilitator, the resulting rule should be more acceptable to the competing interests and less likely tobe the subject of litigation.

EPA has prepared and submitted a charter for a federal advisory committee. In the event negotiations proceed, the representatives of various parties will conduct bargaining sessions through this vehicle. The Charter for this Committee is attached hereto.

EPA has adopted the "Procedures for Negotiating Proposed Regulations" promulgated by the Administrative Conference of the United States for use in its bargaining sessions. (Copy attached.) In addition, the parties themselves will adopt their own protocols for the process under the guidance of a facilitator as the first part of the negotiation.

Additional descriptive material is attached to this Task Order and should be reviewed as background information relevant to this negotiation. The material includes the following items: EPA Regulatory Negotiation Overview, Regulatory Negotiation Overview - FORUM, Interview with Lee Thomas, and Breaking Down the Walls: Negotiated Rulemaking at EPA.

The project is expected to take a total of 9 months to complete and will be divided into two distinct phasis: convening phase and facilitation phase.

PHASE I CONVENING THE NEGOTIATIONS

Objective: To determine whether a regulatory negotiation concerning the Rule on Farmworker Protection Standards is likely to be successful, and if so, to determine the interests that must be represented in the negotiation, the members of the actual negotiating group, and the issues that must be addressed.

Schedule: Complete all work within three months of award.

Tasks for the first phase include Convening Support, Documenting Support, Analytic Support, Resource Support, and Training Support. Refer to the applicable provisions in sections C.2 and C.3 for the substantive requirements of the above tasks. Use this information to prepare your proposal. Anticipate difficulties that may be encountered and list available options.

At the conclusion of the convening phase, the convener submits a report containing his/her professional opinion on the prospect of resolving the issues through negotiation given the mix of parties and the desire of the parties to negotiate in good faith. Assume that the convenor recommends proceeding with the negotiation.

PHASE II THE BARGAINING SESSIONS

Objective: To develop, through negotiations, a consensus proposal for the Rule on Farmworker Protection Standards.

Schedule: Complete all work within six months of end of Phase I.

Tasks for Phase II include: Facilitating Support, Documenting Support, Analytic Support, Resource Support, and Direct Support. Refer to the applicable provisions in Sections C.2 and C.3 for the substantive requirements of the above tasks. Use this information to prepare your proposal. Anticipate difficulties that may be encountered and list available options.

RESOURCE AND TIME REQUIREMENTS

Estimated Labor Intensity* by Task for Phases I and II:

Convening Support: 2.5 work months

Facilitating Support: 2.5 work months

Documenting Support: 2.0 work months

Analytic Support: 2.0 work months

Resource Support: 2.0 work month

Training Support: 1.0 work months

Direct Support: 0.5 work months

*The term "Labor Intensity" refers to cumulative staff time for the entire Task Order.

TRAVEL

There will be 5 monthly bargaining sessions of the federal Advisory Committee in Washington, D. C. Each session will last 2 days.

DELIVERABLES

Monthly progress reports

Final Report for each task indicating progress of negotiation, problems solved, and recommendations for future negotiations.

TYPE OF CONTRACT ANTICIPATED

It is anticipated that this Task Order will result in a firm fixed-price contract.

Appendix F

AGREEMENT FOR SERVICES
OF NEUTRAL ADVISOR

This agreement, dated this _____ day of executed by the U. S. Army Engineer District, , on behalf of the Corps of Engineers (hereinafter referred to as "Corps"),

and

WHEREAS, on the day of the Corps, on behalf of the United States of America, and entered into Contract No. (hereinafter referred to as "Contract") for the construction of and

WHEREAS, has filed a claim with the Corps in accordance with the Contract Disputes Act of 1978 alleging that

and

WHEREAS, in a letter dated the Corps' contracting officer issued a final decision denying claim; and

WHEREAS, on appealed the Corps' final decision to the Corps of Engineers Board of Contract Appeals, where the appeal has been docketed as Eng BCA No. and

WHEREAS, the Corps has instituted an Alternative Contract Disputes Resolution Procedure known as a "Mini-Trial", which procedure provides the parties with a voluntary means of attempting to resolve disputes without the necessity of a lengthy and costly proceeding before a Board of Contract Appeals but without prejudicing such proceeding; and

WHEREAS, and the Corps have agree to submit Eng BCA No. 5128 to a "Mini-Trial" and have requested to serve as neutral advisor for the "Mini-Trial":

NOW, THEREFORE, the parties hereto mutually agree as follows:

1. agrees to serve as neutral advisor for the "Mini-Trial" to be held in on and to undertake those services set forth in the "Mini-Trial Agreement Between the United States Army Corps of Engineers and dated which agreement is attached hereto and incorporated herein by reference. shall be compensated for services rendered in the lump sum amount of , which sum shall include all fees and expenses incurred by by virtue of this agreement, including all travel and lodging expenses as well as time spent in preparation for the "Mini-Trial."

2. and the Corps agree to share equally the fees and expenses incurred by in connection with his services as neutral advisor, as set forth in paragraph 1, above. Payment to for services rendered will be made separately by and the Corps upon submission of an invoice to each of them in the amount of

3. further agrees to treat any information conveyed to him in connection with the "Mini-Trial" as confidential and agrees to refrain from disclosing to third parties any of the information exchanged at the Mini-Trial" or in preparation therefor.

4. The parties agree that will be disqualified as a trial witness, consultant, or expert for any party and that his advisory response will be inadmissible for any purpose in this or any other dispute under the contract.

CORPS OF ENGINEERS

By:__________________ By:_____________________ _____________________

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ADMINISTRATIVE CONFERENCE OF THE UNITED STATES: A BIBLIOGRAPHY

1968-1986

Sue Judith Boley*

The Administrative Conference of the United States was established by public law in 1964 as a permanent, independent federal agency to study the efficiency and fairness of the administrative processes in the federal government, and to recommend improvements to the President, the Congress, the agencies concerned, and the Judicial Conference. Since the appointment of its first chairman in 1968, the Administrative Conference has addressed a wide variety of topics ranging, for example, from a congressionally mandated study of the rulemaking procedures of the Federal Trade Commission to a number of projects exploring various provisions of the Freedom of Information Act. Major themes currently under study include informal adjudication and alternative dispute resolution, efficient approaches to regulation and deregulation, governmental torts, and regulation of financial services.

Topics of inquiry may be chosen by the Chairman of the Conference, the Council, the committees, and the Assembly+. In most cases a research contractor is hired to perform in-depth research in the area of concern. The consultant and staff of the Office of the Chairman work closely with conference committees in drafting recommendations to be considered for adoption by the Assembly. The Assembly may approve, amend, remand, or reject recommendations presented by committees. Adopted recommendations may result in new congresssional legislation or direct action on the part of the affected agencies.

The product of the Conference takes two principal forms: staff or consultant reports, and Conference recommendations and statements. Recommendations and statements adopted by the Assembly are published in the *Federal Register* (Fed. Reg.), and in most cases (depending on continuing general interest) in the *Code of Federal Regulations* (recommendations at 1 C.F.R. § 305, statements at 1 C.F.R. § 310). Staff and consultant reports are often published as periodical articles or monographs, or serve as the basis for such publications.

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*Librarian and Information Officer, Administrative Conference of the U. S. Earlier bibliographies appeared at 30 AD. L. REV. 303 (1978), and 33 AD L. REV. 235 (1981), and 36 AD. L. REV. 307 (1984).

+For further information about the organization of the Administrative Conference *see*: [1985] ACUS ANN. REP., Washington, D. C., U. S. Government Printing Office (Superintendent of Documents No. Y 3.Ad 6:1/985). *See also* 1 C.F.R. §§ 301.1 to 310.11.

Texts of all recommendations and statements and the reports that led to them, are published in a four-volume series entitled *Recommendations and Reports of the Administrative Conference of the United States* and its successor series, *Administrative Conference of the United States: Recommendations and Reports* (both hereinafter cited as ACUS). Full texts of adopted recommendations and statements also appear in the corresponding annual report of the Administrative Conference. Miscellaneous staff and consultant reports not leading to formal recommendations and not published in journals or monographic form are made available for distribution by the Conference.

This bibliography covers the major work of the Conference from its first Plenary Session in May 1968 through the thirty-third Plenary Session in December 1986. During this period 117 recommendations were adopted along with 11 formal statements, all of which were based on reports prepared by consultants, staff, or committees. Included herein are 217 reports of research contractors and staff (committee reports excluded): 107 of these resulted in recommendations and 10 led to Conference statements.

Each entry includes the author, title, and article citation(s). In those cases where the report was published in a journal as well as in a volume of ACUS, the title is shown as it appears in the journal. Early volumes of *Recommendations and Reports of the Administrative Conference of the United States* are cited as 1 ACUS ________, 2 ACUS ________, etc. References to reports that are included in continuing volumes of ACUS (published in yearly compilations beginning with 1978) are cited as 1978 ACUS ________, 1979 ACUS __________, etc.

Entries resulting in Conference recommendations include the recommendation number, title and a C.F.R. or Fed. Reg. citation. The texts of recommendations and statements of continuing general interest are codified in the C.F.R. For other recommendations and statements, C.F.R. lists the title and, for those adopted after 1972, also a citation to the *Federal Register* where the text was published. The texts of all recommendations adopted prior to 1973 are located in volumes 1 and 2 of ACUS as well as in annual reports of the Administrative Conference. These annual reports are cited by period covered and page, *e.g.*, [1970-71] ACUS ANN. REP. 84, for those early recommendations and statements not codified in C.F.R.

The first 35 recommendations of the Administrative Conference were sequentially numbered 1 through 35 and were so designated in most publications until 1972. Thereafter the current official numbering system for Conference recommendations was adopted whereby recommendations are numbered sequentially in the order adopted for the year of adoption, *e.g.*, 72-1 refers to the first recommendation adopted in 1972; 72-2, the second in 1972; 76-1, the first in 1976; etc.

The purposes of this bibliography are to acquaint the researcher with the work of the Administrative Conference and to assist in locating reports by supplying the appropriate bibliographic information. Reports should be obtained directly from their published source in lieu of requesting them from the Administrative Conference. The four-volume series, *Recommendations and Reports of the Administrative Conference of the United States* (Superintendent of Documents classification number Y 3.Ad 6:9), and its successor series, *Administrative Conference of the United States: Recommendations and Reports* (also Y 3.Ad 6:9), can be found in most government depository libraries.

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